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IN THE
SUPREME COURT OF THE UNITED STATES

TERRY L. STEWART,
Director, Arizona Dept. of Corrections, et al.,
PETITIONERS,

-vs-

JOE LEONARD LAMBRIGHT,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

CAPITAL CASE

1. May a federal court excuse a habeas petitioner's state court procedural default on the basis that the state rule was not sufficiently clear to be an "adequate" ground of decision when the record shows the defense counsel actually understood what was required by the rule when he violated it, so he was not misled and his default was not caused by the hypothetical lack of clarity in the rule?

2. May a state procedural requirement be sufficiently established by published rules alone to provide an "adequate" ground of decision that will prevent federal review, but if not, was the Arizona requirement that ineffective assistance of counsel claims be raised on direct appeal sufficiently established by cases existing prior to the appeal in this case?

3. If a state court ruling denying relief does not fairly appear to rest primarily upon federal law (the necessary predicate to application of the *Harris v. Reed* presumption), but does discuss both state-law procedural default and the federal-law merits of the claim, may federal habeas courts ignore the intended procedural default ruling in order to review the merits of the federal-law issue?

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Lambright v. Stewart, 241 F.3d 1201 (9th Cir. 2001). (Reproduced in Appendix A.)

STATEMENT OF JURISDICTION

Petitioners respectfully request that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit, which reversed the District Court's denial of habeas corpus relief and remanded for an evidentiary hearing. The United States Court of Appeals for the Ninth Circuit issued its decision on March 6, 2001. (Appendix B.) A timely combined petition for rehearing/rehearing *en banc* was denied by order filed May 15, 2001. Petitioners timely filed the petition for writ of certiorari within 90 days of that decision. This Court has jurisdiction pursuant to United States Constitution Article III, Section 2; 28 U.S.C. § 1254(1); and Supreme Court Rule 10.

PROVISIONS INVOLVED: SEE APPENDIX C.

Arizona Rules of Criminal Procedure 31.4 (and Comment); 32.2.

STATEMENT OF THE CASE

Lambright and co-defendant Robert Smith kidnapped a woman in March of 1980; Lambright repeatedly raped her and, with Smith's assistance, brutally murdered her. His convictions and sentences, including the death penalty, were affirmed on direct appeal. *State v. Lambright*, 138 Ariz. 63, 673 P.2d 1 (1983), *cert. denied*, 469 U.S. 892 (1984).

Lambright sought post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., alleging *inter alia* ineffective assistance by his trial attorney. In accordance with Arizona law the judge who had presided over the trial handled that petition and denied all relief, stating:

> The ineffective[ness] claim is not a colorable claim. The lengthy recitations in the petition when studied and reviewed against the reality [of] the trial represent merely another lawyer's guess at how witnesses should have been or might have been examined and perhaps how different tactics might have been used, all with the clarity of 20-20 hindsight. The trial court heard the motions as well as the trial and could not in good conscience find a genuine effectiveness argument. *In addition, this case was appealed on behalf of Mr. Lambright by an experienced criminal appellate attorney, not the trial attorney, who examined the entire record and transcript and failed to raise the issue on appeal, a knowing, voluntary, and intelligent waiver; therefore the defendant is precluded under Rule 32.2(a)(3)*, and the court finds that there is in fact no colorable claim of ineffectiveness.

(Minute Entry of 4/17/85; emphasis added.)

Lambright filed a motion for rehearing challenging various aspects of this ruling, including the denial of the ineffective assistance claim. The court responded:

> Paragraph a—this issue existed factually prior to appeal; the Arizona Supreme Court looked at the entire sentencing process exhaustively, testing it for error of constitutional dimensions and found none. There is therefore the suggestion, and strong inference, that this claim is precluded under Rule 32.2(a)(2); *however, i[f] not, the Court finds that since it clearly could have been raised on direct appeal, that it has been knowingly, voluntarily and intelligently waived by failure to raise it, and therefore is precluded pursuant to Rule 32.2(a)(c) and (c)* [sic]. . . .

(Minute Entry of 3/4/86; emphasis added.)[1] Lambright's petition for review was denied by the Arizona Supreme Court without comment.

Lambright eventually sought habeas corpus relief. The District Court concluded the claim that he received ineffective assistance through trial counsel's failure to present mental health mitigation evidence had been procedurally defaulted, because the claim was not argued to the Arizona Supreme Court during the direct appeal, and denied relief. *Lambright v. Lewis*, 932 F. Supp. 1547, 1557–64 (D. Ariz. 1996). A grant of relief to Lambright and Smith by the Ninth Circuit panel (because of dual juries used in their joint trial) was overturned by the *en banc* Court, which remanded for consideration of the remaining issues. *Lambright v. Stewart*, 191 F.3d 1181 (9th Cir. 1999).

The panel held that denial of Lambright's claim regarding ineffective assistance at sentencing was erroneous, because the state trial court's preclusion ruling should not have been honored, and remanded to the District Court for an evidentiary hearing on the claim, *Lambright v. Stewart*, 241 F.3d 1201 (9th Cir. 2001), prompting this petition.

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1. "Rule 32.2(a)(c)" is a scrivner's error, intended to refer to Arizona Rule of Criminal Procedure 32.2(a)(3), which then (pre-1992) precluded relief on any claim "Knowingly, voluntarily and intelligently not raised at trial, on appeal, or in any previous collateral proceeding." Rule 32.2(c) provided that, "The court may infer from the petitioner's failure to appeal or to raise an issue on appeal after being advised by the sentencing judge of the necessity that he do so . . . that he knowingly, voluntarily and intelligently relinquished the right to do so."

REASONS WHY THE WRIT SHOULD ISSUE

I

SINCE A PRIMARY AIM OF THE "ADEQUACY" ELEMENT OF THE "ADEQUATE AND INDEPENDENT STATE GROUND" DOCTRINE IS FAIR NOTICE OF PROCEDURAL REQUIREMENTS, THE DEFENSE'S FAILURE TO RAISE INEFFECTIVE ASSISTANCE CLAIMS ON DIRECT APPEAL DESPITE ACTUAL KNOWLEDGE THAT THEY WERE REQUIRED TO DO SO MEANS THE NINTH CIRCUIT ERRED IN HOLDING LAMBRIGHT'S CLAIM CAN BE REVIEWED DESPITE HIS NONCOMPLIANCE WITH THE CLEARLY INDEPENDENT STATE RULE.

The Arizona court ruled Lambright was not entitled to consideration of his claim that his trial attorney had been ineffective during the sentencing phase because that claim should have been presented during the direct appeal, rather than in the subsequent post-conviction relief ("Rule 32") proceeding. The District Court found this ruling an adequate and independent state ground of decision and denied relief. *Lambright v. Lewis*, 932 F. Supp. 1547, 1557–64 (D. Ariz. 1996). The Ninth Circuit disagreed, on the premise that a habeas petitioner is not required to comply with state procedural rules which are so unclear they did not provide him with "a fair opportunity to seek relief in state court." *Lambright v. Stewart*, 241 F.3d 1201, 1203 (9th Cir. 2001), *quoting Morales v. Calderon*, 85 F.3d 1387, 1390 (9th Cir. 1996). It deemed Arizona law insufficiently unclear about whether it actually was necessary to raise ineffective assistance claims during direct appeal, and so concluded Lambright was not bound by the procedural requirement relied upon by the trial court. 241 F.3d at 1203–06.

This ruling conflicts with the adequate and independent state ground doctrine as explained by this Court and understood by other Courts of Appeals, by speculating about hypothetical possibilities for

misunderstanding when the existing record demonstrates that Lambright's counsel *knew* of the requirement that he raise ineffective assistance claims on appeal, but did not. Totally ignored in its abstract discussion of what defendants *might* have understood about whether they were required to raise such claims on direct appeal is the District Court's factual finding: "The appellate lawyer stated in his affidavit that he would have raised ineffectiveness on appeal had he reviewed the record under *Strickland*. This indicates that Lambright's appellate counsel knew that ineffectiveness *could* be raised on direct appeal." *Lambright v. Lewis*, 932 F. Supp. at 1563 (emphasis in original).[2]

Wilful blindness toward the actual facts of the case is not faithfulness to the independent and adequate state ground doctrine. This Court's discussion of the necessity for a "firmly established and regularly followed state practice" in *Ford v. Georgia*, 498 U.S. 411 (1991), makes clear the fundamental concern behind the "adequacy" element is notice to the defendant of what is required of him:

> "Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, *in justified reliance upon prior decisions*, seek vindication in state court of their federal constitutional rights." *NAACP v. Alabama ex. rel Patterson*, 357 U.S. 449, 457–458 (1958). In the *NAACP* case, we declined to apply a state procedural rule, even though the rule appeared "in retrospect to form part

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2. Arizona traditionally followed the rigorous "farce, shame, or mockery of justice" standard for evaluating ineffective assistance claims. Ten days before Lambright filed his direct appeal brief on October 29, 1982, the Arizona Supreme Court adopted the somewhat less stringent "minimal competence" standard, in *State v. Watson*, 134 Ariz. 1, 4, 653 P.2d 351, 354 (1982). The test from *Strickland v. Washington*, 466 U.S. 668 (1984), was adopted in *State v. Lee*, 142 Ariz. 210, 213–14, 689 P.2d 153, 156–57 (1984), subsequent to the decision in Lambright's appeal. Thus, Lambright's lawyer's statement shows he knew ineffectiveness claims were to be raised on direct appeal, but chose not to, because of the small likelihood of success under the then-current standard of review.

> of a consistent pattern of procedures," *because the defendant in that case could not be "deemed to have been apprised of its existence."* *Id.* at 457.

498 U.S. at 423 (emphasis added). *See also Terrell v. Morris*, 493 U.S. 1, 2 (1989) (petitioner would not be bound by procedural rule announced subsequent to his appeal; he "thus could not have known that he would default his ineffective-assistance claim by his new counsel's failure to raise it on direct appeal"); *Bouie v. City of Columbia*, 378 U.S. 347, 352–54 (1964) ("basic due process concept" of fair warning, which can be lost through vagueness or unforeseeable retroactive application of rules, equated with standard for evaluating whether state procedure is adequate ground to preclude federal review); *Jennings v. Illinois*, 342 U.S. 104, 109–10 and n.9 (1951) (where procedural requirements frequently foreclosed indigents from obtaining transcripts necessary for appeals, held that if no state remedy available, they could proceed in federal habeas. However, state not foreclosed "from showing that any of the petitioners, *in fact, could have obtained review of their claims by writ of error . . .*"); *Cabrera v. Barbo*, 175 F.3d 307, 313 (3rd Cir. 1999) ("The reason for these requirements is that a petitioner should be on notice of how to present his claims in the state courts if his failure to present them is to bar him from advancing them in federal court.").

Several Courts of Appeals recognize that, under *Ford v. Georgia* and this Court's other decisions, proper analysis of contentions that a state procedure is not an adequate ground for denying review requires consideration of the facts of the particular case, rather than the sort of hypothetical, straw-man approach employed by the Ninth Circuit here. *See, e.g., Moore v. Parke*, 148 F.3d 705, 709 (7th Cir. 1998) (federal review of state court decision resting on procedural default is barred "if the petitioner could have known of the procedural requirement and yet still failed to follow it"); *Luberda v. Trippett*, 211 F.3d 1004, 1006–08 (6th Cir. 2000) (rejecting arbitrary "date of conviction rule" for deciding whether changed state procedure which petitioner failed to follow was adequate ground to deny relief; case must be analyzed individually to determine whether petitioner could

be deemed to have been apprised of the requirement); *Hansbrough v. Latta*, 11 F.3d 143, 145–46 (11th Cir. 1994) (procedural requirements insufficient to preclude relief are those "of whose existence the defendant could not reasonably be deemed to have been apprised").

The necessary corollary to *Ford v. Georgia* is that defendants possessing actual knowledge of state procedural requirements do *not* act "justifi[ably]" in ignoring them, and *do* forfeit federal review through noncompliance, regardless of whether those requirements would otherwise constitute an "adequate" state ground. *Henry v. Mississippi*, 379 U.S. 443 (1965), involved a state contemporaneous objection rule. Some question existed whether the purpose of the rule had been fulfilled by a motion following the prosecution case, so that enforcing the rule's specific terms "would serve no substantial state interest [and] settled principles would preclude treating the state ground as adequate." (*Id.* at 448–49.) However, this Court neither resolved that question nor reviewed the substantive claim, because it appeared likely the defense counsel had intentionally foregone objection "and thus that the petitioner should be deemed to have forfeited his state court remedies." (*Id.* at 449–50.) "[C]ounsel's deliberate choice of the strategy would amount to a waiver binding on petitioner and would preclude him from a decision on the merits of his federal claim either in the state courts or here." (*Id.* at 451.) Thus, Lambright's failure to present the ineffective assistance claim on direct appeal, despite his counsel's understanding that it should be so presented, must waive *his* claim, regardless of whether, considered in the abstract, the procedural requirement might be deemed lacking in clarity.

"In a habeas case, moreover, the court [of appeals] must be guided by the general principles underlying our habeas corpus jurisprudence." *Calderon v. Thompson*, 523 U.S. 538, 554 (1998). Habeas corpus is an equitable remedy. *Lonchar v. Thomas*, 517 U.S. 314 (1996). "Application of the 'independent and adequate state ground' doctrine to federal habeas review is based upon equitable considerations of federalism and comity." *Lambrix v. Singletary*, 520 U.S. 518, 523 (1997). "A State's procedural rules are of vital

importance to the orderly administration of its criminal courts; when a federal court permits them to be readily evaded, it undermines the criminal justice system." (*Id.* at 525.) In particular, "Review of the procedural bar and retroactivity issues should be undertaken *based on a correct formulation of the ruling in the District Court*." *Terrell v. Morris*, 492 U.S. at 3 (emphasis added).

A court cannot enforce equity while acting inequitably. In turning a blind eye to the District Court's express finding that Lambright's counsel knew he should raise the ineffective assistance claim on direct appeal and granting relief on the basis of a non-existent state of facts, the Ninth Circuit provided virtually a checklist of the reasons this Court grants certiorari: it decides an important federal question in a way which conflicts with this Court's relevant decisions, such as *Ford v. Georgia*; its decision conflicts with decisions of other circuits; and its decision so departs from the "accepted and usual course of judicial proceedings," particularly the equitable principles which govern habeas corpus proceedings, as to call for an exercise of this Court's supervisory jurisdiction. Supreme Court Rule 10. Certiorari certainly should be granted in this case.

II

THE REQUIREMENT TO RAISE INEFFECTIVE ASSISTANCE CLAIMS ON DIRECT APPEAL WAS CLEAR ENOUGH FROM RULES OF COURT AS WELL AS CONSISTENT ARIZONA JUDICIAL DECISIONS TO BIND LAMBRIGHT AND THE COURT OF APPEALS.

The Ninth Circuit holds that Lambright's failure to raise the ineffective assistance claim on direct appeal is not an adequate default to bar federal review:

> Since Lambright's ineffective assistance of counsel claim required factual development, Rule 32.2 did not clearly require that he raise it on appeal. In fact, Arizona's

> procedural rules required that he wait until state postconviction proceedings to raise it.

241 F.3d at 1204.

A. RULES ADEQUATE TO PREVENT FEDERAL REVIEW CAN BE ESTABLISHED WITHOUT JUDICIAL DECISIONS.

The validity of the holding above depends on the accuracy of its assessment of Arizona law, particularly the content of Rule 32.2: did Arizona really require waiting until a post-conviction proceeding to litigate ineffective assistance claims, or did it demand presentation of such claims in the direct appeal? In fact, the Court of Appeals' characterization of appeal and Rule 32 proceedings as mutually exclusive and always sequential to one another does not portray the Arizona remedial scheme accurately. Arizona procedural rules *did* demand presentation of ineffective trial counsel claims during direct appeal, and legitimately so, provision having been made for record amplification when necessary.

The Ninth Circuit reached its mistaken conclusion about these procedures through a fundamentally flawed analysis which places it in conflict with other courts. First, it fails to recognize the mandatory character of the state preclusion rule. Its statement that, "At the time of Lambright's alleged default, Rule 32.2 provided that 'any ground' '[k]nowingly, voluntarily and intelligently not raised at trial, on appeal, or in any previous collateral proceeding' could be considered waived" (241 F.3d at 1204), only partially quotes Rule 32.2(a), Ariz. R. Crim. P., and seriously distorts the rule. The rule does *not* say that such unraised grounds "could be" considered waived—a formulation suggesting discretion and room for inconsistency. Rather, Rule 32.2(a) bluntly directs, "A petitioner will not be given relief under this rule based upon any ground," within the then-listed categories of prohibited claims. This plain imperative that all claims be raised as early as possible, and that failure to do so shall constitute waiver, contains no exception for ineffective assistance claims.

Aside from its disregard of the mandatory nature of Rule 32.2 preclusion, the Ninth Circuit's reason for finding Arizona's procedures insufficiently clear and well-established to prevent federal review is both simple and simply wrong: "No Arizona case at the time of Lambright's purported default required the defendant to raise an ineffective assistance of counsel claim on appeal." 241 F.3d at 1203. However, no authority from this Court or any other source was offered for the bizarre (not to say arrogant) notion that rules cannot be established by rules, but only by judicial decisions. This Court evidently believes otherwise. For example, in *Hathorn v. Lovorn*, 457 U.S. 255, 263 n.13 (1982), the Court noted that continued existence of a Mississippi procedural bar was unclear because, "Neither the Mississippi Code nor the Rules of the Supreme Court of Mississippi embody the alleged prohibition . . ."—an omission of no moment if only opinions are capable of setting up requirements restricting federal review.

The Ninth Circuit's statement also clearly puts it at odds with other Courts of Appeals. "As a general matter, whenever a procedural rule is derived from state statutes and supreme court rules, as this one is, the rule is necessarily 'firmly established'." *O'Dell v. Netherland*, 95 F.3d 1214, 1241 (4th Cir. 1996), *aff'd on other grounds*, 521 U.S. 151 (1997). *See also Luberda v. Trippett*, 211 F.3d at 1008 (treating new Michigan rule as sufficient to require compliance immediately upon promulgation). Moreover, an unambiguous black-letter rule is "firmly established" and adequate to prevent federal review, even if the state courts have not had occasion to apply it to facts like those in a habeas petitioner's case. *Yeatts v. Angelone*, 166 F.3d 255, 264 (4th Cir. 1999).

Particularly troubling about the holding here, that a state rule is not "adequate" unless expressed in a judicial decision applying it to a similar issue, is that it even contradicts Ninth Circuit law. Two years before *Lambright* another panel of that court stated emphatically:

> We do not read decisions from this Court or the Supreme Court as requiring a state court to locate a case law citation that speaks to the very same factual scenario as the one before it prior to invoking the rule of procedural default. Instead, we follow the Supreme Court's dictate that where a rule is sufficiently clear to put a petitioner on notice that he must raise all claims or risk default, that petitioner must raise all claims. *See Coleman*, 501 U.S. 722. We conclude in this case that petitioner cannot shirk his duty under Nevada law to raise all claims presented to the trial court to an appellate court simply because there is no reported case directly on point. . . . We decline the invitation of the dissent to require a state court to articulate every permutation of every rule before it can invoke procedural default—such a rigid construct of the procedural default doctrine frustrates its purpose and impairs our system of federalism.

Bargas v. Burns, 179 F.3d 1207, 1212–13 (9th Cir. 1999). *Lambright* does not even mention *Bargas*, let alone attempt to reconcile it. Thus, the Court of Appeals managed to ignore and contradict every possible source of guidance about the sufficiency of the Arizona preclusion rule.

Moreover, the requirement to raise all claims on appeal was not obviated by the possibility that allegations of ineffectiveness might involve matters outside the trial record. Arizona Rule of Criminal Procedure 31.4 (not mentioned by the opinion) authorized staying an appeal pending resolution of a Rule 32 petition and consolidating review of the complete petition with the appeal. The Comment to Rule 31.4 explains:

> Under Rule 32.1 a party may file a petition for post-conviction relief at any time subject to Rule 32.2, which precludes the filing of a petition based on any issue still raisable on appeal or in a Rule 24 post-trial motion. In effect, *during the pendency of an appeal, a Rule 32 petition is available* only after perfection of the appeal and only *to raise issues not still*

> *raisable on appeal, such as those for which there is no record.* Thus, it is possible that proceedings may be pending in both the trial and appellate courts.

(Emphasis added.) In other words, contrary to the Ninth Circuit's belief that a need to develop additional facts is inherently inconsistent with requiring that ineffectiveness claims be raised during direct appeal, the black-letter Arizona rules expressly anticipated that when claims needing factual development surfaced during appeal, the Rule 31.4 stay procedure would be employed, permitting efficient appellate consideration of all claims in a single consolidated appeal.

In sum, the Ninth Circuit decision is based upon an obvious misconstruction of what it means for a procedural rule to be "clearly established" and therefore adequate to prevent federal review, in conflict with opinions of this Court, of other circuits, and even of itself. Such confusion calls out for certiorari and resolution.

B. ARIZONA DECISIONS DO NOT RENDER THE RULE UNCLEAR.

It is possible for an otherwise clear rule to become ambiguous through inconsistent state court application, and hence inadequate to prevent federal review, a concept invoked by the Ninth Circuit. See 241 F.3d at 1203–04. However, the Court of Appeals' position that that has occurred to this Arizona rule is wholly unacceptable. First, it effectively rejects *Stewart v. LeGrand*, 526 U.S. 115 (1999). This Court denied relief in that capital case, stating, "The Arizona court held that Walter LeGrand's *ineffective-assistance arguments* were barred pursuant to a state procedural rule, and Walter LeGrand has failed to demonstrate cause or prejudice for his failure *to raise these claims on direct appeal*." (*Id.* at 120, citing Superior Court post-conviction relief proceeding minute entry; emphasis added.) Since this Court found adequate precisely the same rule the Ninth Circuit refused to apply to Lambright, and the Ninth Circuit pointed to no intervening Arizona Supreme Court decisions undermining application of the rule, the Court of Appeals has "decided an important federal

question in a way that conflicts with relevant decisions of this Court," warranting certiorari. Supreme Court Rule 10(c).

Next, *Lambright* even contradicts Ninth Circuit cases which uphold application of this same preclusionary rule. *Carriger v. Lewis*, 971 F.2d 329 (9th Cir. 1992) (*en banc*), found ineffective assistance claims not raised during direct appeal to be procedurally defaulted. 971 F.2d at 333–34. The *Lambright* panel attempts to distinguish *Carriger* (241 F.3d at 1204 n.3), but *Carriger* expressly rejected a contention indistinguishable from the *Lambright* court's view, "that Arizona's reliance on his procedural default was so unpredictable and irregular that it does not provide an adequate ground for disposal of his claims." 971 F.2d at 333. Indeed, the *Carriger* dissent is replete with arguments identical to the panel's position here: that holding ineffectiveness claims waived when not raised on direct appeal "is irreconcilable with our law that when . . . claims of ineffective assistance of counsel depend on matters not apparent in the trial record, the appropriate place to develop them is on collateral review and not on direct appeal" (*id.* at 337); that "Arizona itself does not generally apply Rule 32 waiver as harshly as in this case, but usually limits waiver to the claims that are apparent in the trial record" (*id.* at 339); and that there should be "no procedural bar to federal court consideration of the claims [where] the state court's reliance on an independent and adequate procedural bar was unclear." *Id.* The *Carriger* majority opinion, by an *en banc* court, implicitly rejects all these contentions and should have been accepted as controlling. In refusing to follow either *Carriger* or *LaGrand*, the *Lambright* panel "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." Supreme Court Rule 10(a).

Finally, that the *Lambright* panel was aware of (but disobeyed) *Carriger v. Lewis* is significant in another way. The Ninth Circuit purported to survey Arizona decisions and find therein a "requirement" that ineffective assistance claims be presented in Rule 32 proceedings, rather than direct appeals. 241 F.3d at 1203–04. However, it completely ignores *State v. Carriger*, 143 Ariz. 142, 692

P.2d 991 (1984). After comprehensively comparing direct appeals and Rule 32 proceedings, the Arizona Supreme Court concluded, "***Important policy considerations require that all claims be raised in the appeal.***" 143 Ariz. at 145–46, 692 P.2d at 994–95 (emphasis added). The decision twice refers to "the necessity of raising competency of counsel issues on appeal" as something Carriger was aware of in *1978*. 143 Ariz. at 146, 692 P.2d at 995. Thus, the necessity to raise such claims on direct appeal was known long before Lambright's appeal.[3]

Carriger cites *State v. Herrera*, 121 Ariz. 12, 14, 588 P.2d 305, 307 (1978), which held a defendant who received the required information about his appeal rights but did not appeal could properly be inferred, pursuant to Rule 32.2, to have knowingly waived his right to an appeal. The following year the Arizona Court of Appeals cited *Herrera* for the proposition that, "Rule 32.2 provides that the trial court may infer from the lack of appeal that the petitioner knowingly, voluntarily and intentionally relinquished *any right to raise issues in connection with his original conviction.*" *State v. Salazar*, 122 Ariz. 404, 406, 595 P.2d 196, 198 (App. 1979) (emphasis added). Thus, the failure to raise a claim on appeal which could have been raised *was* understood by the Arizona legal community to default such claims in subsequent Rule 32's.

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3. The Ninth Circuit dismissed as irrelevant all cases decided after Lambright's appeal (241 F.3d at 1203 n.2), but such disregard is arbitrary and injudicious. *State v. Carriger*'s purpose was to summarize how appeals and Rule 32's had interrelated since the Rule was adopted in the early 1970's, not to announce a novel interpretation invented in the months since *Lambright* was decided. Courts are presumed to speak the truth about what they have done. *Parker v. Dugger*, 498 U.S. 308, 314 (1991). Mississippi decisions were accepted as accurately describing state practice prior to their announcement. *Hathorn v. Lavorn*, 457 U.S. at 263. Therefore, what Arizona courts have said about how Rule 32 was applied prior to Lambright's appeal is relevant and reliable evidence of the state of the law at that time.

Understanding the Rule 31.4 stay provision discussed earlier also casts a very different light on cases the Ninth Circuit relied upon as support for its conception that ineffective assistance claims must be reserved for post-appeal Rule 32 proceedings. Although *State v. Valdez*, 160 Ariz. 9, 14–15, 770 P.2d 313, 318–19 (1989), and *State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989), reemphasized the necessity for a factual basis for ineffective assistance claims, they show that a Rule 32 petition to expand the record on such claims was conducted in the context of the direct appeal, *not* as an independent proceeding following its completion. *Krone v. Hotham*, 181 Ariz. 364, 890 P.2d 1149 (1995), is not "clarification" of a previously ambiguous requirement that ineffectiveness claims be held back for a post-appeal Rule 32; instead (a dozen years after Lambright's appeal was decided), it marked a complete change of direction by the Arizona Supreme Court. Although previously that court had "routinely stayed appeals pending resolution of Rule 32 proceedings . . . that practice proved unworkable and resulted in long delays;" therefore, in 1992, it promulgated rule changes requiring automatic initiation of Rule 32's upon completion of direct appeals in capital cases, and announced that, "Now, we will almost never allow a Rule 32 proceeding to delay a direct appeal." 181 Ariz. at 365–66, 890 P.2d at 1150–51.[4]

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4. Thus, before Lambright's appeal the regular practice was to raise ineffective assistance claims on direct appeal in capital cases, to be disposed of on the existing record. *See, e.g., State v. Carriger*, 123 Ariz. 335, 337–38, 599 P.2d 788, 790–91 (1979); *State v. Tison*, 129 Ariz. 546, 556, 633 P.2d 355, 365 (1981); *State v. Britson*, 130 Ariz. 380, 382–84, 636 P.2d 628, 630–32 (1981); *State v. Navarre*, 132 Ariz. 480, 484–85, 647 P.2d 178, 182–83 (1982). It also was common to provide for mid-appeal expansion of the record, without deviating from the requirement that ineffectiveness be *raised* on the direct appeal. *Krone*'s example of the prior "routine" practice of staying appeals while Rule 32's were pending is *State v. Vickers*, 180 Ariz. 521, 885 P.2d 1086 (1994), a capital case involving ineffectiveness claims. *See also State v. Kruchten*, 101 Ariz. 186, 189, 417 P.2d 510, 513 (1966); *State v. Watson*, 114 Ariz. 1, 14–15, 559 P.2d 121, 134–35 (1976); *State v. Zuck*, 134 Ariz. 509, 515–16, 658 P.2d 162 (1982);

(continued...)

Much is made of *State v. Bell*, 23 Ariz. App. 169, 531 P.2d 545 (1975), which says that one purpose of Rule 32 proceedings is to expand the record, so that preclusion extends only to matters for which there was a sufficient factual basis to decide the claim. *Lambright*, 241 F.3d at 1204. However, *Bell* did not relieve defendants of the requirement to *raise* the claim during the appeal in the first place; the panel overlooks that *Bell* remanded for a Rule 32 hearing while staying the appeal in which the ineffectiveness claim had been raised, and then completed consideration of the appeal. *State v. Bell*, 24 Ariz. App. 526, 540 P.2d 145 (1975). Similarly, in *State v. Scrivner*, 132 Ariz. 52, 54, 643 P.2d 1022, 1024 (Ariz. App. 1982), the appellate court had made provision for the defendant to expand the record *in order to argue ineffective assistance on direct appeal*, by granting him new counsel. Therefore, when in a post-appeal Rule 32 Scrivner only presented claims that could have been argued from the original record, the claims were precluded, because not raised in the original appeal. Thus, the Arizona decisions refute rather than support the Ninth Circuit.

The fact of the matter, as found by the District Court, was that "Lambright was provided a real and meaningful opportunity to make his ineffectiveness claim on direct appeal. The opportunity was not so ill-defined as to justify excusing Lambright's failure." *Lambright v. Lewis*, 932 F. Supp. at 1562. Arizona's rule requiring ineffective assistance claims to be raised on direct appeal was sufficiently clear, and the mischief which will be created by permitting the Ninth Circuit's deviant analysis to stand pleads for certiorari.

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4. (...continued)
State v. Ellis, 117 Ariz. 329, 334, 572 P.2d 791, 796 (1977); and *State v. Rogers*, 113 Ariz. 6, 545 P.2d 930 (1976).

III

THE NINTH CIRCUIT MISUNDERSTOOD *HARRIS v. REED* IN FAILING TO RECOGNIZE THAT THE ORDER DENYING RECONSIDERATION WAS NOT AMBIGUOUS AT ALL, JUST A COMMON ALTERNATIVE DEFAULT AND MERITS RULING, BUT IF THERE WAS AMBIGUITY, THE COURT OF APPEALS ABDICATED ITS DUTY TO EXAMINE THE FULL STATE COURT RECORD TO ATTEMPT TO RESOLVE THE TRUE INTENT OF THE RULING.

When Lambright sought review of the denial of his post-conviction relief petition the Arizona Supreme Court denied review without comment. Therefore, to determine the scope of the issues preserved for federal habeas corpus review, it was necessary to "look through" that unspecific ruling to the last reasoned determination, the ruling of the trial court. *Ylst v. Nunnemaker*, 501 U.S. 797 (1991). In rejecting Lambright's motion for reconsideration of its prior denial of relief, the trial court stated:

> Paragraph a—this issue existed factually prior to appeal; the Arizona Supreme Court looked at the entire sentencing process exhaustively, testing it for error of constitutional dimensions and found none. There is therefore the suggestion, and strong inference, that this claim is precluded under Rule 32.2(a)(2); *however, i[f] not, the Court finds that since it clearly could have been raised on direct appeal, that it has been knowingly, voluntarily and intelligently waived by failure to raise it, and therefore is precluded pursuant to Rule 32.2(a)([3]) and (c) . . . .*

(Minute Entry of 3/4/86; emphasis added.)

The Ninth Circuit overruled the District Court's acceptance of the procedural default ruling, stating:

> The last reasoned opinion on Lambright's ineffective assistance of counsel [claim] did not clearly invoke a procedural default rule and therefore does not bar federal review. It is well established that "a procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case clearly and expressly states that its judgment rests on a state procedural bar." *Harris v. Reed*, 489 U.S. 255, 263 [(1989)]. Indeed, "a procedural default based on an ambiguous order that does not clearly rest on an independent and adequate state ground is not sufficient to preclude federal collateral review." *Morales v. Calderon*, 85 F.3d [1387,] 1392 [(9th Cir. 1996)].

241 F.3d at 1205.

The Court of Appeals took the *Harris* language out of context in precisely the same way that was condemned in *Coleman v. Thompson*, 501 U.S. at 735–36, by distorting the predicate required before federal courts may presume there was no adequate and independent state ground of decision. "The presumption at present applies only when it fairly appears that a state court judgment rested primarily on federal law or was interwoven with federal law, that is, in those cases where a federal court has good reason to question whether there is an independent and adequate state ground for decision." 501 U.S. at 739. This Court's formulation places the burden on the *challenger* of an alleged independent state ground (whether petitioner or court) to show it "fairly appears" the state court judgment rested *primarily on federal law* before the state-law basis for the ruling can be overlooked.

Whatever else may be said about the ruling here at issue, it certainly does *not* "fairly appear" to rest primarily on federal law. Moreover, both here and in *Morales* the Ninth Circuit turned this Court's rule upside-down, shifting the burden onto the *custodians* to show that the state court ruling "clearly rests" on *state* grounds. Thus, we have a series of holdings on an important federal question,

not merely conflicting with but directly contrary to "relevant decisions of this Court"—a compelling basis for granting certiorari.

Moreover, even aside from this illegitimate revision of the *Harris/Coleman* doctrine, the Court of Appeals blatantly misapplied *Harris*. This Court found the state court ruling in that case insufficiently clear because it merely mentioned that claims "could have been raised on direct appeal" without explicitly relying on a state-law procedural ground and went on to reject them on their merits. However, this Court reassured everyone that the adequate and independent state ground doctrine requires federal courts to honor state-law holdings "even when the state court also relies on federal law" (489 U.S. at 264 n.10), so that conjoined alternative state and federal grounds provide no basis for federal review. The Court even specified that "a state court that wishes to rely on a procedural bar rule in a one-line *pro forma* order easily can write that 'relief is denied for reasons of procedural default'." *Harris v. Reed*, 489 U.S. 255, 265 n.12 (1989).

The trial court here did exactly what this Court indicated in *Harris* would be sufficient to insulate its ruling from federal review. Although adverting to the possibility that the claim might have been silently reviewed by the Arizona Supreme Court, it specifically found not only that the ineffective assistance issue could have been raised on direct appeal but also that, "it has been knowingly, voluntarily and intelligently waived by the failure to raise it, and therefore is precluded pursuant to Rule 32.2(a)([3]) and (c)."

The trial court's statement did all that has been required by this Court. With commendable realism this Court has recognized that overburdened state courts may sometimes neglect to furnish as clear a statement of reliance on state procedural grounds as might be desirable, but has refused to impose a style manual on the state judiciary. *Coleman v. Thompson*, 501 U.S. at 738–39. Thus, although the Virginia Supreme Court's reference to consideration of all the papers filed in the case added "some ambiguity," this Court refused to read it "as overriding the court's explicit grant of a

dismissal motion based solely on procedural grounds," and therefore found the grounds independent of federal law. 501 U.S. at 744.

As demonstrated by *Coleman* and Court of Appeals decisions finding other state court rulings adequate to bar federal review, the trial court's ruling denying reconsideration in this case, even considered in isolation, should have been accepted. *See, e.g., Tejada v. Dugger*, 941 F.2d 1551, 1558 (11th Cir. 1991) ("this issue could have raised at the time of trial and on direct appeal, but was not, and review is therefore precluded" sufficient, despite additional merits discussion); *Pelmer v. White*, 877 F.2d 1518, 1520 (11th Cir. 1989) (statement of procedural ground sufficient, although state court added, "even assuming the claim is valid," it would be denied on merits); *Cabrera v. Barbo*, 175 F.3d at 312–14 (state appellate court's addition of merits ruling to affirmance of trial court's denial of relief on procedural ground did not render procedural ground inadequate); *Scott v. Mitchell*, 209 F.3d 854, 864–67 (6th Cir. 2000) (where state supreme court said "appellant neglected to object to the trial court's instruction in this regard and has accordingly waived any objections," that it also said that, "More importantly," the issue lacked merit did not render inadequate the procedural ruling, which barred federal review); *McBee v. Abramajtys*, 929 F.2d 264, 266–67 (6th Cir. 1991) (statement there was no reversible error "because defendant did not object to the instruction" sufficient reliance on independent state ground, even when coupled with discussion of claim's lack of merit). The Ninth Circuit's failure to accept the ruling illuminates its misunderstanding of the applicable standard, and its conflict with the other circuits.

Coleman v. Thompson also states:

> We encourage state courts to express plainly, in every decision potentially subject to federal review, the grounds upon which their judgments rest, but we will not impose on state courts the responsibility for using particular language in every case in which a state prisoner presents a federal claim—every state appeal, every denial of state collateral review—in order that

> federal courts might not be bothered with reviewing state law and the record in the case.

501 U.S. at 739.

This duty of federal courts to review "the record of the case" in order to ascertain the true import of state court rulings they perceive as ambiguous is particularly pertinent to this case. In purported reliance upon *Ylst v. Nunnemaker*, the Ninth Circuit insisted that *only* the ruling on denial of rehearing could be considered, finding that the District Court had erred in taking account of the trial court's original ruling denying post-conviction relief. 241 F.3d at 1205. Thus, even while characterizing the order denying rehearing as unclear, the Court of Appeals intentionally forewent clarification readily available elsewhere in "the record of the case." The trial court's first ruling, like the second, alludes alternatively to procedural and merits grounds for denying relief, but does so with somewhat greater clarity and distinction:

> The ineffective[ness] claim is not a colorable claim. The lengthy recitations in the petition when studied and reviewed against the reality [of] the trial represent merely another lawyer's guess at how witnesses should have been or might have been examined and perhaps how different tactics might have been used, all with the clarity of 20-20 hindsight. The trial court heard the motions as well as the trial and could not in good conscience find a genuine effectiveness argument. *In addition, this case was appealed on behalf of Mr. Lambright by an experienced criminal appellate attorney, not the trial attorney, who examined the entire record and transcript and failed to raise the issue on appeal, a knowing, voluntary, and intelligent waiver; therefore the defendant is precluded under Rule 32.2(a)(3)*, and the court finds that there is in fact no colorable claim of ineffectiveness.

(Minute Entry of 4/17/85; emphasis added.)

Using *Ylst* as an excuse to avoid consideration of plainly relevant material was error. In *Ylst* this Court authorized looking through a silent state supreme court order to an explained lower court order; it did *not* authorize a habeas court to ignore an earlier explained order, on the same subject matter, in the same case, by the same state court, especially when the habeas court expresses doubt about the intent of the last explained order. The Court's concern for the *accuracy* of federal courts' handling of state court rulings demands that they consider circumstances surrounding the state court orders which could contribute to that accuracy. *Ylst*, 501 U.S. at 802–05. We have already seen that *Coleman v. Thompson* affirms the duty of federal courts to review pertinent parts of the record of the case in assessing alleged procedural bars when the state court has failed to utilize some talismanic phrase to indicate what it has done. 501 U.S. at 739. *See also Fisher v. Angelone*, 163 F.3d 835, 846 (4th Cir. 1998) ("Although the Bedford Circuit Court never explicitly stated the ground for denying Fisher's motion to amend, the record as a whole points to a procedural resolution of the claim."). Therefore, ignoring anything relevant to the meaning of the supposedly ambiguous final order of the trial court, especially its initial denial order, violates *Ylst* and *Coleman*.

The Ninth Circuit certainly misapplied not only *Harris v. Reed* but *Ylst* and *Coleman* in order to avoid crediting the state court's procedural ruling. Certiorari should therefore be granted. Supreme Court Rule 10(a), (c).

CONCLUSION

Based on the foregoing authorities and arguments, Petitioners respectfully request that this Court grant the petition for writ of certiorari, vacate the Court of Appeals' decision, and affirm the District Court's denial of all relief to Lambright.

Respectfully submitted,

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APPENDIX A

[241 F.3d 1201]
JOE LEONARD LAMBRIGHT,
Petitioner-Appellant,

v.

TERRY STEWART, Director, Arizona Department of Corrections,
Respondent-Appellee.

No. 96-99020

United States Court of Appeals,
Ninth Circuit

Argued and Submitted Aug. 17, 2000
Filed March 6, 2001

David P. Tiers, Tucson, Arizona for the Petitioner-Appellant.

Scott A. Bales, Solicitor General, Phoenix, Arizona, for the Respondent-Appellee.

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Appeal from the United States District Court for the District of Arizona; Richard M. Bilby, Chief Judge, Presiding, D.C. No. CV-87-235-TUC-RMB.

Before: FERGUSON, REINHARDT, and DAVID R. THOMPSON, Circuit Judges.

FERGUSON, Circuit Judge:

Joe Leonard Lambright ("Lambright") appeals the district court's procedural dismissal of his ineffective assistance of counsel claim. We conclude that the district court incorrectly found that the state court's order dismissing Lambright's claim rested on an independent and adequate state ground. Because he has presented a colorable claim to relief and has not received a hearing, we order an evidentiary hearing in the district court.

I.

On March 30, 1982, Lambright and co-defendant Robert Douglas Smith were convicted of first degree murder, sexual assault, and kidnapping.[1] Lambright's former girlfriend and accomplice, Kathy Foreman ("Foreman"), agreed to testify as the State's main witness pursuant to an immunity agreement. The State sought the death penalty.

The mitigation that Lambright's lawyer offered at sentencing comprises less than three pages of a double-spaced transcript. Although there were signs at the time that Lambright suffered from a mental illness, his counsel failed to present any mitigating psychiatric testimony. Instead, the attorney promised the court that he had "one witness who will be very brief." He then called a correction officer from the Pima County Jail, who had known Lambright for just six months. The officer testified that he personally had no "problems with him as an inmate" and knew of no "compliants made by other inmates." When

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the lawyer finished questioning the detention officer, he turned to the court and announced, "[y]our Honor, we have nothing more to put forward at this time. Thank you."

In his closing argument, Lambright's lawyer offered two reasons for sparing his client from execution. First, in the lawyer's words, Foreman "was a co-defendant and co-conspirator in everything but the

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1. Because we described the facts of the offense in detail in our en banc opinion, we do not repeat them. *See Lambright v. Stewart*, 191 F.3d 1181, 1182-83 (9th Cir. 1999) (en banc).

charge made by the county attorney. I think it's a circumstances [sic] this Court has to consider." Second, as the lawyer explained, "I submit there is a prior forgery or some such crime in Louisiana sometime ago. The record presented shows a man, but for this instance, with no violent background."

On the day of sentencing, the court offered Lambright's lawyer another opportunity to argue on his client's behalf. The lawyer responded, "I made the argument at the mitigation hearing held prior to this date. Thank-you." The court then sentenced Lambright to death after finding the existence of a single aggravating factor: that the murder had been committed in an especially heinous, cruel, or depraved manner.

II.

Lambright raised an ineffective assistance of counsel claim in his first petition for postconviction relief. The district court held that he had procedurally defaulted the claim under Arizona Rule of Criminal Procedure 32.2 ("Rule 32.2") by failing to raise it on direct appeal. We conclude that the rule requiring Lambright to raise his ineffective assistance of counsel claim on appeal does not bar federal habeas review because it was "so unclear that it d[id] not provide the habeas petitioner with a fair opportunity to seek relief in state court." *Morales v. Calderon*, 85F.3d 1387, 1390 (9th Cir. 1996) (internal quotation marks omitted).

"In order to constitute adequate and independent grounds sufficient to support a finding of procedural default, a state rule must be *clear*, consistently applied, and *well-established* at the time of petitioner's purported default." *Wells v. Maass*, 28 F.3d 1005, 1010 (9th Cir. 1994) (emphasis added); see also *Ford v. Georgia*, 498 U.S. 411, 423-24, 111 S. Ct. 850, 112 L.Ed.2d 935 (1991). No Arizona case at the time of Lambright's purported default required the defendant to raise an ineffective assistance of counsel claim on appeal.

The State relies on *State v. Zuck*, 134 Ariz. 509, 658 P.2d 162 (1982), to support its contention that such a rule existed, but its

reliance is misplaced.[2] In *Zuck*, the appellant raised an ineffectiveness claim on appeal and the Arizona Supreme Court remanded for a hearing on the issue. *Id.* at 168. In so doing, the court remarked that, "*when the issue* of competency of trial counsel *has been raised*, we have always resolved the matter with whatever was before us in the record and without giving trial counsel an opportunity to be heard. However, we believe that in some cases *where this issue is raised*, it would be appropriate to remand the case for a hearing on the question." *Id.* (emphasis added). The court's description of its approach to cases in which appellants *did* raise an ineffective assistance of counsel claim on appeal falls far short from a clear rule requiring all appellants to do so. Thus, contrary to the State's assertion, *Zuck* does not contain a clear rule requiring ineffectiveness claims to be raised on appeal.

Significantly, the Arizona Supreme Court has since clarified that "[a]s a general rule, ineffective assistance of counsel claims should be raised in post-conviction relief proceedings pursuant to Rule 32, Arizona Rules of Criminal Procedure." State

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v. Atwood, 171 Ariz. 576, 832 P.2d 593, 616 (1992), see also *Krone v. State*, 181 Ariz. 364, 890 P.2d 1149, 1151 (1995) ("We continue to commend the Rule 32 process to resolve claims of ineffective assistance of counsel."); *State v. Carver*, 160 Ariz. 167, 771 P.2d 1382, 1390 (1989). In *State v. Valdez*, 160 Ariz. 9, 770 P.2d 313, 318 (1989), for example, the Arizona Supreme Court explained that, "if the defendant wishes to raise an ineffective assistance of counsel issue, he should ordinarily begin someplace other than in this court." It so held because "this court is reluctant to decide claims of ineffective assistance in advance of an evidentiary hearing to determine the reasons for counsel's actions or inactions on any particular point." *Id.*

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2. The State also relies on cases that the Arizona Supreme Court decided after Lambright's appeal. Obviously, these cases are not relevant in determining whether the rule the State claims existed was sufficiently clear or well-established at the time of Lambright's alleged default to bar federal review.

To prove that Lambright defaulted his Sixth Amendment claim by failing to raise it on appeal, the State alternatively relies on Rule 32.2's general procedural default rule.[3] At the time of Lambright's alleged default, Rule 32.2 provided that "any ground" "[k]nowingly, voluntarily and intelligently not raised at trial, on appeal, or in any previous collateral proceeding" could be considered waived. It was well-established, however, that an appellant could not raise any issue outside of the trial record. *See State v. Pearson*, 98 Ariz. 133, 402 P.2d 557, 559 (1965) (refusing to consider affidavit in support of claim "being of the view that they are not properly raised in this Court"); *State v. Lindsay*, 5 Ariz. App. 516, 428 P.2d 691(Ct. App. 1967) ("The record before this Court is very meager, and it has been stated repeatedly that the appellate court will consider and review only those matters which appear in the record before it and will not consider those matters not properly supported by the record.") (citations omitted). As one Arizona court explained:

> Rule 32 has as its aim the establishment of proceedings to determine the facts underlying a defendant's claim for relief when such facts are not otherwise available. . . . When Rule 32.2 is viewed with this aim in mind, we are of the opinion that the preclusion of post-conviction relief under this rule on the ground that the matter is still raisable on direct appeal applies only to those matters in which a sufficient factual basis exists in the record for the appellate court to resolve the matter.

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3. In *Poland v. Stewart*, 169 F.3d 573, 579 (9th Cir. 1999), and *Carriger v. Lewis*, 971 F.2d 329 (9th Cir. 1992) (en banc), we rejected both the contention that the state court orders, finding that the petitioners had defaulted their claims of ineffective assistance of counsel on appeal, constituted a decision on the merits and the broad assertion that all of Arizona's default rules are inconsistently applied. We were not, however, faced with the same challenge we confronted here: that the particular procedural default rule the sate court relied on was insufficiently clear, in light of the rule prohibiting claims that relied on evidence outside the record from being raised on appeal, to bar federal review. Therefore, *Poland* and *Carriger* do not control.

State v. Bell, 23 Ariz. App. 169, 531 P.2d 545 (Ct. App. 1975). Indeed, in *State v. Scrivner*, 132 Ariz. 52, 643 P.2d 1022, 1024 (Ct. App. 1982), the court specifically distinguished between ineffective assistance claims "based on the record," which were subject to waiver on appeal, and those that had an "apparent necessity for the development of these matters by further factual hearings."

In this first Rule 32 petition, Lambright alleged that his attorney failed to investigate or present evidence of his mental disability and social history. Of course, neither the evidence of counsel's deficiencies nor the prejudice cased therefrom appeared in the trial records. Since Lambright's ineffective assistance of counsel claim required factual development, Rule 32.2 did not clearly require that he raise it on appeal. In fact, Arizona's procedural rules required that he wait until state postconviction proceedings to raise it. Thus, the procedural default in this case is inadequate to bar federal review. See *McGregor v. Gibson*, 219 F.3d 1245, 1252-53 (10th Cir. 2000) (concluding that state procedural bar, based on petitioner's failure to raise ineffectiveness claim on direct appeal, was inadequate to preclude federal

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habeas review because "that information would have been outside the trial record").[4]

Moreover, even if such a procedural rule clearly existed at the time of Lambright's direct appeal, the state court's order in this case does not "clearly and expressly" rest on such a rule. "Thus, the Arizona court did not rely on an independent state ground so as to bar federal habeas review. The district court incorrectly based its conclusion that it could not consider Lambright's constitutional claim on the state court's first, rather than last, reasoned opinion on Lambright's ineffective assistance of counsel claim. To determine

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4. Because the rule that the district court applied in this case was insufficiently clear to bar federal review, we need not determine whether a state procedural rule requiring a habeas petitioner to raise an ineffectiveness claim on appeal, which at the same time precludes him from referring to evidence outside of the record to make the necessary showing under *Strickland*, violates the Due Process Clause.

whether a state procedural ruling bars federal review, we look to the "last reasoned opinion on the claim." *Ylst v. Nunnemaker*, 501 U.S. 797, 804, 111 S. Ct. 2590, 115 L.Ed.2d 706 (1991). We do so because, "[s]tate procedural bars are not immortal . . .'; they may expire because of later actions by state courts." *Id.* at 801, 111 S. Ct. 2590.

The last reasoned opinion on Lambright's Sixth Amendment claim is the state trial court's Order denying rehearing on is first state post-conviction petition. In the order, the court wrote:

> Ineffective assistance of counsel.
>
> Paragraph a—this issue existed factually prior to appeal; the Arizona Supreme Court looked at the entire sentencing process exhaustively, testing it for error of constitutional dimensions and found none. There is therefore the suggestion, and strong inference, that this claim is precluded under Rule 32.2(a)(2); however, it [sic] not, the Court finds that since it clearly could have been raised on direct appeal, that it has been knowingly, voluntarily and intelligently waived by failure to raise it, and is therefore precluded pursuant to Rule 32(a)(c) and (c).

By stating that there was a "strong inference" that the claim was "precluded" under Rule 32.2(a)(2), the state court indicated that it believed that the Arizona Supreme Court had already rejected it on the merits, which prevented Lambright from further litigating the claim.[5] In the next part of the order, however, the court suggested a contradictory possibility: that Lambright had failed to raise the claim before and had therefore waived it under Rule 32.2(a)(3).

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5. As quoted above, Arizona's waiver or procedural default rule is set forth in Rule 32.2(a)(3), which provides that, "[a] petitioner will not be given relief under this rule based upon any ground: . . . (3) knowingly, voluntarily, and intelligently not raised at trial, on appeal, or in any previous collateral proceeding." By contrast, Rule 32.2(a)(2) sets forth Arizona' preclusion doctrine by providing that "[a] defendant shall be precluded from relief under this rule based upon any ground" "[f]inally adjudicated *on the merits* on appeal or in any previous collateral proceeding." Ariz. R. Crim. Pro. 32.2(a)(2) (emphasis added).

The last reasoned opinion on Lambright's ineffective assistance of counsel did not clearly invoke a procedural default rule and therefor does not bar federal review. It is well established that "a procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case clearly and expressly states that its judgment rests on a state procedural bar." *Harris v. Reed*, 489 U.S. 255, 263, 109 S. Ct. 1038, 103 L.Ed.2d 308. Indeed, "a procedural default based on an ambiguous order that does not clearly rest on an independent and adequate state ground is not sufficient to preclude federal collateral review." *Morales v. Calderon*, 85 F.3d at 1392.

In *Ceja v. Stewart*, 97 F.3d 1246, 1253 (9th Cir. 1996), we held that a state court's finding that was virtually indistinguishable

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from the one in this case did not bar federal habeas review. There, the state court rejected Ceja's second post-conviction petition "for the reasons stated in [the State's] Response to Petitioner's Petition." In the response, the State had argued that, "all of petitioner's grounds are precluded because petitioner either knowingly, intelligently and voluntarily withheld them on direct appeal or his previous Rule 32 proceedings, or they have been previously determined against petitioner's position on the merits." *Id.* We concluded that a finding of both waiver, based on a petitioner's failure to comply with procedural rules, and preclusion, based on a court's belief that the state courts had already adjudicated and rejected the claim, was "inconsistent." *Id.* In ruling that such an inconsistent order did not bar federal review of Ceja's dismissed claims, we explained, "[p]reclusion does not provide a basis for federal courts to apply a procedural bar. By adopting Arizona's mixed arguments of preclusion and waiver with respect to these claims, the state court in Ceja's second Rule 32 proceeding did not clearly base its decision on independent and adequate state grounds." *Id.* (citations omitted).

The order in this case similarly does not bar federal review. Like the order in *Ceja,* the state court's ruling in Lambright's case contains mixed and inconsistent findings of preclusion and waiver. By invoking two contradictory arguments, the state court failed to make a clear finding of procedural default and federal review is not barred.

Because the state court in this case did not clearly and expressly invoke a procedural bar as the basis of its ruling, the State's reliance on *Poland v. Stewart*, 169 F.3d 573 (9th Cir. 1999), is misplaced. In *Poland*, the state court dismissed the petitioner's constitutional claims on procedural grounds without explanation. *Id.* at 579. Faced with the unexplained state court order, we looked to the prior proceeding to determine whether it was based on procedural default. *Id.*[6] In doing so, we specifically contrasted the order in *Poland*, which was unexplained, with the order in *Ceja*, which by including "mixed arguments of preclusion and waiver with respect to these claims . . . did not clearly base its decision on independent and adequate state law grounds." *Id.* at 579 n. 10 (quoting *Ceja*, 97 F.3d at 1253). Because the order in this case also included "mixed arguments of preclusion and waiver with respect to [Lambright's ineffectiveness] claim," it does not bar federal habeas review.

III.

Lambright asserts that he is entitled to an evidentiary hearing because he has raised a colorable claim of ineffective assistance of counsel and no state court has ever granted him an opportunity to develop his claim. We agree and therefore remand to the district court. See *Siripongs v. Calderon*, 35 F.3d 1308, 1310 (9th Cir. 1994).

To ultimately prevail on his ineffective assistance of counsel claim, Lambright must show that his counsel's performance was deficient, and that the deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 690, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984); see also *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 1514-15, 146 L.Ed.2d 389 (2000). Defense counsel have a general "duty to make reasonable investigations or to make a

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6. Our examination of the earlier state court order was consistent with the Supreme Court's instruction in *Ylst*, 501 U.S. at 803, 111 S. Ct. 2590, that "where, as here, the last reasoned opinion on the claim explicitly imposes a procedural default, we will presume that a later decision rejecting the claim did not silently disregard that bar and consider the merits."

reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691, 104 S. Ct. 2052.

Lambright argues that an extensive series of "red flags" should have motivated counsel to investigate his psychiatric condition

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and to present mitigating psychiatric testimony at sentencing. Lambright's presentence Psychological Evaluation told of his service in Vietnam, during which he witnessed the violent death of friends, and the mental breakdown that he suffered after returning to this country. It described some of the hallucinations he had experienced and his subsequent need for hospitalization in a mental facility. The report also mentioned two of Lambright's attempts to commit suicide. In an affidavit before the district court, moreover, Lambright wrote that he had "discussed his past mental problems and drug use with his trial counsel." There can be no doubt that Lambright has raised a colorable claim of deficient performance. Counsel's alleged failure to obtain a psychiatric evaluation of Lambright, despite knowing of his wartime experience and extensive drug abuse, is the type of performance courts have labeled deficient under *Strickland*. *See Williams*, 120 S. Ct. at 1514 (holding that the failure to "conduct an investigation that would have uncovered extensive records graphically describing [the petitioner's] nightmarish childhood" constituted deficient performance); *Turner v. Ducan*, 158 F.3d 449, 456 (9th Cir. 1998) ("[Counsel's] failure to arrange a psychiatric examination or utilize available psychiatric information also falls below acceptable performance standards."); *Seidel v. Merkle*, 146 F.3d 750, 755 (9th Cir. 1998) (holding that counsel was ineffective in failing to conduct any investigation into his client's psychiatric history despite evidence that the petitioner had been treated with medication while awaiting trial, that he had been treated in a V.A. Psychiatric Hospital, and that he suffered from a mental illness, namely Post Traumatic Stress Disorder), *cert. denied*, 525 U.S. 1093, 119 S. Ct. 850, 142 L.Ed.2d 704 (1999).

We have also held that the failure to interview family members, in light of indications of mental disorder, constitutes deficient performance. *See Seidel*, 146 F.3d at 750. In this case, had counsel interviewed Lambright's sister, he would have learned that Lambright

began to display signs of a mental disorder as soon as he returned from Vietnam. In an affidavit before the district court, she described her brother's behavior as "kind, gentle and well-behaved" before serving in Vietnam, after which "his behavior and manner were greatly changed. He appeared extremely tense paranoid and nervous. He began using drugs and alcohol during this period." She also wrote that, after deliberately smashing his car into a tree, he told her that "he was so mad and mixed up, suicide seemed like the best way out." On another occasion, Lambright showed up at her house in the middle of the night and banged on her screen door. When she got up to see who it was, she saw her brother cowering against a wall, hiding. He was crying and muttering incoherently. Then he said, "I gotta get to'em. I see 'em, they're burning, Mom and Daddy, they're burning."

Psychiatric evaluations of Lambright after the court imposed the death penalty indicates the seriousness of his trial counsel's alleged failure to conduct reasonable investigations. Before the district court, Lambright introduced the affidavit of Dr. Donald Stonefeld, a medical doctor specializing in psychiatry with a sub-specialty in neurology and post traumatic stress disorder. After reviewing Lambright's history, Dr. Stonefeld concluded that "an emotional illness did exist at the time of the offense," and that the documents he reviewed "indicate post-traumatic stress disorder and a probable disorder due to excessive drug use." He also recommended "[t]hat a full mental examination of Mr. Lambright is necessary and warranted in order to determine his mental condition at the time of the offense." In addition, Lambright introduced the affidavit of a pharmacologist, Martha Fankhauser, who concluded that "chronic amphetamine use such as is reported by Mr. Lambright may case long-term psychiatric changes including anxiety reactions [and] psychosis." Like Dr. Stonefeld, she recommended that "a psychiatric evaluation of Mr. Lambright is desirable and necessary in order to determine if

[pg.1208]

there is an underlying psychiatric disorder which may have been brought on by the ingestion of these substances." Lambright has presented more that enough evidence to establish a colorable claim of deficient performance.

We have no doubt that Lambright also has a colorable claim of prejudice under *Strickland*. Lambright's lawyer presented no psychiatric evidence or argument at the sentencing hearing. The evidence Lambright has presented, without the benefit of a hearing, shows that his lawyer could have presented extensive mitigating evidence at sentencing. Instead, Lambright's counsel stated meekly, "I have one witness who will be very brief." The witness was correction officer who testified as to Lambright's conduct during a six-month period while he awaited trial. We have previously found that the prejudice requirement is met where "defense counsel effectively presented no mitigating evidence at sentencing, despite the presence of aggravating factors." *Smith*, 189 F.3d 1004, 1013 (9th Cir. 1999), *cert. denied*, — U.S. —, 121 S. Ct. 358, 148 L.Ed.2d 288, 2000 WL 1056515 (2000). Prejudice is especially likely where, as here, "this is not a case in which a death sentence was inevitable because of the enormity of the aggravating circumstances." *Bean*, 163 F.3d at 1081. In fact, in this case the State argued that only one aggravating factor existed. Although the offense in this case certainly was brutal and sadistic, the Supreme Court in *Williams* recently noted that "[m]itigating evidence unrelated to dangerousness may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case." *Williams*, 120 S. Ct. at 1516; see also *Correll v. Stewart*, 137 F.3d 1404, 1413 ("[B]ecause trial counsel failed to present any evidence of Correll's purported mental illness which may have satisfied Ariz. Rev. Stat. § 13–703(E), Correll has 'undermined confidence in the outcome' of the sentencing, thereby establishing the requisite Strickland prejudice."). Evidence of mental disabilities or a tragic childhood can affect a sentencing determination even in the most savage case. We are compelled to order an evidentiary hearing so that the district court can determine both the quality of Lambright's counsel's performance and its effect on the decision to sentence him to death.

IV.

We reverse the judgment of the district court and remand for an evidentiary hearing. We remand for the district court to determine whether Lambright was denied effective assistance of counsel at

sentencing because of the failure to investigate and present evidence of his psychiatric condition and social history.

Concurrently herewith we file a memorandum disposition in which we affirm the Petitioner's conviction and the district court's ruling that the especially heinous, atrocious, and cruel aggravating factor applies in this case for the reasons stated therein. Accordingly, the judgment below is

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED for further proceedings consistent with this opinion.

APPENDIX B

FILED

May 15, 2001
Cathy A. Catterson, Clerk
U.S. Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOE LEONARD LAMBRIGHT, Petitioner-Appellant, v. TERRY STEWART, Director, Arizona Department of Corrections, Respondent-Appellee.	)	No. 96-99020 DC# CV-87-00235-TUC-RMB Arizona ORDER
ROBERT DOUGLAS SMITH, Petitioner-Appellant, v. TERRY STEWART, Director, Arizona Department of Corrections, Respondent-Appellee.	)	Nos. 96-99025, 96-99026 DC# CV-87-00234-TUC-RMB Arizona ORDER

Before: FERGUSON, REINHARDT, THOMPSON, Circuit Judges

The panel has voted to deny the petition for rehearing filed by the petitioners.

The full court has been advised of the suggestion for rehearing en banc and no judge

has requested a vote on whether to hear the matter en banc.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is

REJECTED.

APPENDIX C - Arizona Rules of Criminal Procedure

Rule 31.4 Motion to stay appeal; notice of reinstatement of appeal; consolidation of appeals

a. Motion To Stay Appeal; Notice of Reinstatement of Appeal.

(1) The Appellate Court, on motion of a party or on its own initiative, may stay an appeal while a motion under Rule 24 or a petition under Rule 32 is pending. If a stay is ordered, the clerk of the Appellate Court shall notify all parties, the clerk of the trial court, and, if the transcript has not yet been filed, the appropriate court reporters.

(2) Within 20 days after the trial court's decision on the motion or petition, the appellant shall file with the clerk of the Appellate Court, and send to all persons notified of the stay, either a notice of reinstatement of the appeal or a motion to dismiss the appeal under Rule 31.15(a)(2).

b. Consolidation of Appeals.

(1) Appeals which raise a common question of law or fact may be consolidated at any time by order of the Appellate Court upon its own initiative after opportunity has been given to the parties to raise objections or upon motion of a party or upon stipulation by the parties.

(2) An appeal from a final decision on a Rule 24 motion or Rule 32 petition filed prior to a notice of appeal or filed while an appeal is pending and decided while the appeal is stayed, shall be consolidated with an appeal from the judgment or sentence, unless good cause is shown why such consolidation should not occur.

Comment

This rule is intended to prevent unnecessary duplication and to further define the relationship between appeals and collateral post-conviction procedures. See Rules 31.2(f)(4), 24.2 and 32.2.

Rule 31.4(a). Under Rule 31.3 a notice of appeal must be filed within 20 days of entry of judgment and sentence, and under Rule 31.11 the appeal is perfected at the time the first major filing is due in the appellate court. Under Rules 24.2 and 24.3(a), a defendant may move the trial court to vacate a judgment or unlawful sentence before an appeal is perfected. Under Rule 32.1 a party may file a petition for post-conviction relief at any time subject to Rule 32.2, which precludes the filing of a petition based on any issue still raisable on appeal or in a Rule 24 post-trial motion. In effect, during the pendency of an appeal, a Rule 32 petition is available only after perfection of the appeal and only to raise issues not still raisable on appeal, such as those for which there is no record. Thus, it is possible that proceedings may be pending in both the trial and appellate courts.

Section (a) is intended to empower the appellate court to stay the appeal whenever this jurisdictional overlap threatens to waste the efforts of the courts or the parties. There is no mandatory stay provision. The decision is left with the sound discretion of the appellate court, to balance the delay in prosecution of the appeal against possible gains in judicial efficiency, including elimination of the appeal if the motion or petition is granted or consolidation of an appeal from the decision on the motion or petition with the appeal already pending.

Rule 31.4(b). Rule 31.4(b) encompasses two situations. Paragraph (1) governs when separate appeals are taken from the same or similar cases such as when co-defendants file separate appeals. Consolidation is discretionary. The parties have an opportunity to raise objections to consolidation whether it is suggested by a party or by the court. See Rules 35.1 and 35.3.

Paragraph (2) governs the situation covered in Rule 31.4(a) and is made virtually mandatory since the parties to the appeal from the Rule 24 motion or Rule 32 petition and to the appeal from judgment and sentence will nearly always be identical. Such appeals should

be consolidated automatically unless it can be shown that such consolidation would substantially prejudice one of the parties.

Rule 32.2. Preclusion of remedy

a. Preclusion. A petitioner will not be given relief under this rule based upon any ground:

(1) Still raisable on direct appeal under Rule 31 or on post-trial motion under rule 24;

(2) Finally adjudicated on the merits on appeal or in any previous collateral proceeding;

(3) Knowingly, voluntarily and intelligently not raised at trial, on appeal, or in any previous collateral proceeding.

b. Exceptions. Rule 32.2 shall not apply to claims based on Rules 32.1(d), (e) and (g).

c. Inference of Waiver. The court may infer from the petitioner's failure to appeal or to raise an issue on appeal after being advised by the sentencing judge of the necessity that he do so, or his failure to raise any ground then available to him in a previous Rule 32 proceeding in which he was represented by counsel, that he knowingly, voluntarily and intentionally relinquished the right to do so.

d. Standard of Proof. The prosecutor shall plead and prove any ground of preclusion by a preponderance of the evidence; however, the inference of section (c) shall be considered part of the evidence.

Supreme Court, U.S.
FILED

01 691 AUG 13 2001

OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

TERRY L. STEWART, Director, Arizona Dept. of Corrections, et al.,
PETITIONERS,

-VS-

JOE LEONARD LAMBRIGHT,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX D

932 F.Supp. 1547

Joe Leonard **LAMBRIGHT,** Petitioner,
v.
Samuel A. **LEWIS** and Robert Goldsmith, Respondents.

No. CIV 87-235 TUC RMB.

United States District Court,
D. Arizona.

July 9, 1996.
*1555

AMENDED MEMORANDUM OPINION AND ORDER

BILBY, District Judge.

Joe Lambright, under sentence of death, seeks habeas corpus relief. This Court has jurisdiction pursuant to 22 U.S.C. § 2241 and 22 U.S.C. § 2254, and herein denies the petition.

FACTUAL BACKGROUND

In early 1980, Joseph Leonard Lambright, Robert Douglas Smith and Kathy Foreman began a cross country driving trip from Texas, to Florida, and then on to California, stopping in Arizona. Foreman was Lambright's lover who frequently engaged in sexual intercourse with Lambright in Smith's presence. The trio stopped outside Tucson and camped for the night. Smith became angry when he observed Lambright and Foreman once again having sex. He complained that Lambright, unlike Smith, had all the sex he wanted and that it was not easy to find someone.

The following day, the three drove into Tucson and went to a restaurant. Smith again spoke about wanting a woman, and Lambright spoke about wanting to "kill somebody just to see if he could do it." Lambright then told Foreman that they were going to go find someone for Smith.

After driving around town for quite a while, the trio saw a young woman hitchhiking near the University of Arizona campus. Twenty-nine year old Sandy Kay Owen explained to them that she was trying to get to the food stamp office. They drove Owen to the food stamp office and parked behind the building. Lambright jumped into the back seat with Owen and told her to "shut up and be quiet and she wouldn't get hurt." Smith moved to the driver seat and headed toward the freeway.

At some point during the drive toward California, Lambright began driving, with Smith in the back seat with Owen. Smith had sex with Owen in the back seat, on the freeway, heading northwest. Owen asked if they would let her go.

The group later left the freeway and proceeded on a dirt road in a mountainous area of Pinal County. They left the car at the end of the dirt road and traveled on foot to a level area on a mountain. At the level area, Lambright and Foreman again had intercourse and Smith again had sex with Sandy Owen.

Smith began choking Sandy and she collapsed to the ground. Lambright said that she had to be killed so that she could not report their crimes. He took Foreman's knife and began stabbing Ms. Owen in the torso and chest, twisting the knife around ***1556** inside her. Smith and Foreman each held one of her arms, as the victim tried to resist. Smith attempted to break her neck by twisting her head, but was unsuccessful. Lambright, and possibly Foreman, then began cutting into Ms. Owen's neck. Sandy Owen was still alive and was trying to lift herself up on one arm. At that point, Lambright threw a large rock at Sandy's head, yelling, "Die, bitch."

The trio took some jewelry from the victim's body then covered it with rocks, and headed toward San Diego. In the car they played a song on tape entitled "We are the Champions." In San Diego, they pawned Owen's ring before driving on to Anaheim, Las Vegas and finally back to Texas.

About a year later, law enforcement received a tip about the crime and the three were separately questioned. Each made statements to the police.

Foreman was granted immunity from prosecution for her testimony against Lambright and Smith, who were returned to Arizona for prosecution.

PROCEDURAL BACKGROUND

Petitioner Joe Leonard Lambright, was convicted by a jury of murder in the first degree, kidnapping and sexual assault. Although Pima County Superior Court Judge Michael V. Brown severed the cases of Lambright and Smith, there was a single trial with two juries. Evidence that was relevant to both was presented to both juries and evidence admissible against only one, was presented before only that jury. The court sentenced Lambright to death for the murder and to twenty-one years imprisonment to run consecutively on each of the remaining convictions.

Lambright appealed to the Arizona Supreme Court, which affirmed the conviction and sentence in *Arizona v. Lambright,* 138 Ariz. 63, 673 P.2d 1 (1983). The United States denied certiorari in *Lambright v. Arizona,* 469 U.S. 892, 105 S.Ct. 267, 83 L.Ed.2d 203 (1984).

Pursuant to Ariz.R.Crim.P. 32, the Petitioner then sought post-conviction relief in the trial court. Finding the claims to be either precluded or not colorable, the trial court denied relief. Following denial of his request for rehearing in the trial court, the Petitioner then sought review in the Arizona Supreme Court. That court denied the petition for review on July 9, 1986 and set execution for April 29, 1987.

Mr. Lambright filed his original habeas corpus petition in this Court on April 14, 1987 and this Court promptly stayed the execution. The State of Arizona moved to dismiss the petition on the grounds of procedural default and the presence of unexhausted claims. This Court granted the Respondents' motion and dismissed the mixed petition without prejudice, but retained jurisdiction and continued the stay of execution.

After nearly two years of apparent inactivity, Lambright was appointed new counsel, who filed another Rule 32 petition in state court. The trial court denied the Petitioner's amended Rule 32 petition, and the Supreme Court denied review without comment.

The Petitioner then sought authorization from this Court for expenditure of funds. He wanted to employ various experts and investigators in order to develop the claim that trial counsel's failure to present evidence of the

Petitioner's mental health status was ineffective assistance of counsel. This Court considered Lambright's request three times, and three times denied it, concluding that Lambright had not established cause and prejudice to overcome procedural default.

Lambright filed his Amended Petition for Writ of Habeas Corpus on February 23, 1995. He also subsequently filed another Rule 32 notice in state court, for the first time raising the issue of ineffective assistance of counsel on direct appeal. The trial court refused to allow such a claim, finding it barred by failure to raise it in the two previous post-conviction relief proceedings. The Respondents then filed an answer to Lambright's amended habeas petition on August 22, 1995, and Lambright filed his reply on November 29, 1995. The Court denied, without prejudice, Lambright's motion for evidentiary hearing and oral argument on February 8, 1996. On April 22, 1996, this Court received a certified copy of the state record. Following months of effort by this Court to ***1557** obtain a complete state court record, Lambright's petition for relief is appropriate for federal habeas review.

DISCUSSION

The Petitioner raises thirty grounds for relief in the Amended Petition, arranged under the headings of (1) ineffective assistance of counsel claims; (2) trial claims; and (3) sentencing claims. The Court considers the claims in turn, and for clarity and for convenience to the reader, organizes the issues in the same manner as the Amended Petition.

I. INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS (Claims 1-4)

As mentioned above, the Petitioner previously moved this Court for authorization of funds for experts and investigators in order to develop an ineffective assistance of trial counsel claim. The Petitioner's theory is that trial counsel's failure to present evidence of the Petitioner's mental health status was ineffective assistance of counsel. The Petitioner posited that at the time of trial evidence existed, but was not presented, that would have demonstrated significant mental health problems. This evidence allegedly includes, post traumatic stress syndrome episodes as a result of combat service in Vietnam, two suicide attempts, and an emotional breakdown after his father's death and during the decline of his marriage. Despite the Court's previous rulings finding the claims procedurally defaulted, the

Petitioner continues to press his assertions of ineffective assistance of counsel.

Specifically, Lambright complains that trial counsel failed to investigate, develop and present mitigation evidence with respect to his mental health, family background and military service. Counsel did not attend and did not prepare Lambright for the presentence interviews or psychological evaluation. Counsel did not consult with Lambright regarding sentencing procedures and did not employ a presentence investigator or mental health expert for use at sentencing. He did not advocate on Lambright's behalf at the sentencing and did not request a pretrial competency hearing. He did not make an opening statement and did not consider the possible effect of sustained drug use on the case. Trial counsel also failed to request a jury instruction on lesser included offenses to first degree murder. The Court concludes, however, that these claims cannot be considered on the merits.

A. The Doctrine of Procedural Default and the Exhaustion Requirement

A state court prisoner's federal habeas petition must be dismissed if he has not exhausted remedies available in the state. 28 U.S.C. § 2254(b); *Ex parte Royall*, 117 U.S. 241, 6 S.Ct. 734, 29 L.Ed. 868 (1886); *Rose v. Lundy*, 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982). *See also Picard v. Connor*, 404 U.S. 270, 92 S.Ct. 509, 30 L.Ed.2d 438 (1971) (holding that federal claims must first be fairly presented to state courts before being presented to federal courts); *Middleton v. Cupp*, 768 F.2d 1083, 1086 (9th Cir.1985) (stating that exhaustion requires fair presentation [to] the state's highest court), *cert. denied*, 478 U.S. 1021, 106 S.Ct. 3336, 92 L.Ed.2d 741 (1986). This exhaustion requirement is based on notions of comity and respect for the state courts' role in vindicating the federal rights of state prisoners. *Rose*, 455 U.S. at 516-18, 102 S.Ct. at 1202-03; *Hendricks v. Zenon*, 993 F.2d 664, 672 (9th Cir.1993). A federal court defers ruling on unexhausted claims that are otherwise properly before it, so that the state court has the first opportunity to correct claimed violations. *Id.*

Like the habeas petitioner who does not exhaust his state court remedies, a petitioner who fails "to meet the state's procedural requirements for presenting his federal claims has deprived the state courts of an opportunity to address those claims in the first instance." *Coleman v. Thompson*, 501 U.S. 722, 732, 111 S.Ct. 2546, 2555, 115 L.Ed.2d 640 (1991). *See also Castille v. Peoples*, 489 U.S. 346, 351, 109 S.Ct. 1056, 1060, 103 L.Ed.2d

380 (1989) (determining that a claim has not been fairly presented to the state court to satisfy the exhaustion requirement when it is presented in a procedurally inappropriate manner that renders consideration of the merits unlikely). This is procedural default, which is simply an application ***1558** of the doctrine of adequate and independent state grounds. *English v. United States,* 42 F.3d 473, 477 (9th Cir.1994) (citing *Coleman,* 501 U.S. at 729-31, 111 S.Ct. at 2553-55).

The doctrine of adequate and independent state grounds dictates that a federal court will not review a state court decision that rests on a state law ground, either substantive or procedural, that is independent of federal law and is adequate to sustain the decision. *Fox Film Corp. v. Muller,* 296 U.S. 207, 210, 56 S.Ct. 183, 184, 80 L.Ed. 158 (1935). Where a state court declines to consider a state prisoner's federal claims because he failed to meet a state procedural requirement, this doctrine bars federal habeas review. This is because the state court decision rests on independent, adequate state procedural grounds. *Coleman,* 501 U.S. at 729-30, 111 S.Ct. at 2553-54 (citing *Wainwright v. Sykes,* 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977); *Ulster County Court v. Allen,* 442 U.S. 140, 148, 99 S.Ct. 2213, 2219, 60 L.Ed.2d 777 (1979); *Harris v. Reed,* 489 U.S. 255, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989)). It is this doctrine that prevents a state prisoner from defaulting his federal claims in state court and avoiding the exhaustion requirement. *Coleman,* 501 U.S. at 732, 111 S.Ct. at 2555.

A state court judgment rests on adequate and independent state law grounds where it does not fairly appear to rest primarily on federal law or is not interwoven with federal law. Where there is a clear and express statement that the state court is relying on a state procedural default as the basis for decision, independent of federal law, the state's judgment is based on adequate, independent state law grounds. *See Michigan v. Long,* 463 U.S. 1032, 1040-41, 103 S.Ct. 3469, 3476-77, 77 L.Ed.2d 1201 (1983) (requiring that state law ground be clear from the face of the opinion); *Caldwell v. Mississippi,* 472 U.S. 320, 327, 105 S.Ct. 2633, 2639, 86 L.Ed.2d 231 (1985) (applying *Long* to procedural default grounds); *Harris v. Reed,* 489 U.S. 255, 263, 109 S.Ct. 1038, 1043-44, 103 L.Ed.2d 308 (applying *Caldwell* and *Long* in a habeas case).

In this case, the state procedural rule at issue is Ariz.R.Crim.P. 32.2(a)(3). [FN1] That rule precludes state collateral review of claims waived at trial, on appeal, or in any previous collateral proceedings.

FN1. All references to Ariz.R.Crim.P. 32.2(a) are to the rule as it existed at the time of Lambright's trial, appeal and petitions for post-conviction relief. The rule was promulgated in 1955 and made effective January 1, 1956. It was amended on August 1, 1975 and was not further amended until 1992. The 1975 version is the subject of this habeas petition.

Lambright first raised the federal claim of ineffective assistance of trial counsel in state court in his initial Rule 32 post-conviction relief petition. As explained in this Court's previous rulings (Orders of June 20, 1995; Mar. 8, 1995; July 11, 1994), state law prevailing at the time of Lambright's conviction, sentence and appeal, required that ineffective assistance claims be raised on direct appeal.

The Arizona appellate courts, at that time, either decided ineffectiveness claims based on the record before them, or returned the claims to the trial court for a hearing. *See e.g., Arizona v. Watson,* 114 Ariz. 1, 559 P.2d 121 (1976) (resolving on direct appeal those submitted ineffective assistance of counsel claims that did not raise matters outside the record and directing the trial court to consider submitted colorable claims raising matters outside the record), *cert. denied,* 430 U.S. 986, 97 S.Ct. 1687, 52 L.Ed.2d 382 (1977); *Arizona v. Zuck,* 134 Ariz. 509, 515, 658 P.2d 162, 168 (1982) (en banc) (noting that "[i]n the past, when the issue of competency of trial counsel has been raised, we have always resolved the matter with whatever was before us in the record," and concluding that in some cases, "it would be appropriate to remand the case for a hearing on the question"). [FN2]

FN2. *See also Arizona v. Scrivner,* 132 Ariz. 52, 643 P.2d 1022 (Ct.App.1982) (denying Rule 32 relief because the petitioner did not raise ineffectiveness claim on direct appeal).

While it is true that trial competency claims were at times remanded to the trial court for hearing, there is no support for the contention that those claims need not have been first presented to the appellate court on ***1559** direct appeal. During the relevant time frame, direct appeal was considered "the preferred method for presenting claims of reversible error." *Arizona v. Carriger,* 143 Ariz. 142, 144, 692 P.2d 991, 994, 996 (1984) (en banc) (finding the death sentenced defendant's failure to raise ineffective assistance of counsel claim on direct appeal constituted waiver of the right to claim error), *cert. denied,* 471 U.S. 1111, 105 S.Ct. 2347, 85 L.Ed.2d

864 (1985). [FN3] "Important policy considerations require that all claims be raised in the appeal." *Id.* 143 Ariz. at 146, 692 P.2d at 995.

> FN3. The *Carriger* court held that the defendant's ineffectiveness claims were barred by state law but nonetheless reached the merits in light of *Beck v. Alabama,* 447 U.S. 625, 637-38, 100 S.Ct. 2382, 2389-90, 65 L.Ed.2d 392 (1980) (noting that the death penalty is different from any other sentence). The court ultimately affirmed the trial court's denial of Carriger's Rule 32 petition claiming ineffective assistance of counsel. *Carriger,* 692 P.2d at 1008.

The applicable procedural rule at the time provided that "[a] petitioner will not be given relief under this rule based upon any ground ... [k]nowingly, voluntarily and intelligently not raised at trial, on appeal, or in any previous collateral proceeding." Ariz.R.Crim.P. 32.2(a). That rule made no exception for ineffectiveness claims.

The trial court judge relied on that procedural rule in finding Lambright's ineffectiveness claims barred when considering the first Rule 32 petition in 1985. Judge Brown stated:

> [T]his case was appealed on behalf of Mr. Lambright by an experienced criminal appellate attorney, not the trial attorney, who examined the entire record and transcript and failed to raise the issue on appeal, a knowing, voluntary and intelligent waiver, therefore the defendant is precluded under Rule 32.2(a)(3), and the court finds that there is in fact no colorable claim of ineffectiveness.

(Pima County Superior Court Minute Entry of Apr. 17, 1985 at 8). The Judge found Lambright's ineffectiveness claim precluded and found it not colorable. While he did apparently speak to the merits, Judge Brown's explicit determination that the claim was precluded is an alternative holding that maintains the procedural bar. *Sochor v. Florida,* 504 U.S. 527, 112 S.Ct. 2114, 119 L.Ed.2d 326 (1992); *Harris v. Reed,* 489 U.S. 255, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989); *Carriger v. Lewis,* 971 F.2d 329 (9th Cir.1992), *cert. denied,* 507 U.S. 992, 113 S.Ct. 1600, 123 L.Ed.2d 163 (1993); *Thomas v. Lewis,* 945 F.2d 1119, 1122-23 (9th Cir.1991).

It was not until 1989 that the Arizona Supreme Court first intimated that ineffectiveness claims would be more properly raised via a Rule 32

proceeding than on direct appeal. In *Arizona v. Valdez,* 160 Ariz. 9, 770 P.2d 313 (1989) (en banc), the court stated:

> As a general matter, we recommend that when a defendant wishes to raise the question of ineffective assistance during the pendency of his appeal, he should file the proper petition under Rule 32, Ariz.R.Crim.P., 17 A.R.S., in the trial court and seek an order from the appellate court suspending the appeal. The trial court should then hold an evidentiary hearing and make its ruling. Afterward, a defendant should seek to consolidate the postconviction proceedings with the direct appeal. See Rule 31.4, Ariz.R.Crim.P., 17 A.R.S.

Valdez, 160 Ariz. at 15, 770 P.2d at 319. [FN4]

> FN4. Mr. Valdez's ineffectiveness claim was subsequently considered by the trial court in a Rule 32 proceeding. The Arizona Supreme Court affirmed the trial court's finding that Valdez did not suffer ineffective assistance of counsel. *Arizona v. Valdez,* 167 Ariz. 328, 332, 806 P.2d 1376, 1380 (1991) (en banc).

The court continued to consider ineffectiveness claims on direct appeal. Shortly after *Valdez,* the court reached the merits of a death penalty defendant's claims of incompetent counsel in *Arizona v. Walton,* 159 Ariz. 571, 769 P.2d 1017 (1989) (en banc), *aff'd by* 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990). The procedural practice of ineffectiveness claims on direct appeal continued even into 1989.

Later that year, the state supreme court refused to consider an ineffectiveness claim ***1560** on direct appeal, ruling that "[o]nly, where we may clearly determine from the record that the ineffective assistance is meritless, will we elect to consider the issue on direct appeal." *Arizona v. Carver,* 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989) (en banc) (reaching the merits and denying the claim). *See also Arizona v. Marlow,* 163 Ariz. 65, 69-70, 786 P.2d 395, 399-400 (1989) (en banc) (citing *Carver* and determining that ineffectiveness claims should be raised by counsel other than trial counsel).

At this point, it became clear that a defendant may pursue the federal ineffectiveness claim in the trial court, while his direct appeal is stayed. Until this point, the defendant was required to raise the claim on appeal and await the appellate court's determination of whether a hearing was required

to further develop the record. The Petitioner did not do so. He has, therefore procedurally defaulted his claims of ineffective assistance of counsel.

Lambright presents several arguments in his effort to avoid procedural default. He argues first that procedural default is inapplicable because the state's high court did rule on his ineffectiveness claims. He then argues that, for a variety of reasons, the trial court's finding of procedural bar does not rest on adequate, independent state law grounds. These arguments are unavailing.

Lambright asserts that there has been no default because the Arizona Supreme Court conducted review for fundamental error on direct appeal. This fundamental error review, the Petitioner states, includes review of the proficiency of counsel, as the right to counsel is a fundamental right. *See Arizona v. Brewer,* 170 Ariz. 486, 826 P.2d 783 (1992) (en banc), *cert. denied,* 506 U.S. 872, 113 S.Ct. 206, 121 L.Ed.2d 147 (1992); *Arizona v. Sorrell,* 132 Ariz. 328, 645 P.2d 1242 (1982); *Arizona v. Smith,* 136 Ariz. 273, 279, 665 P.2d 995, 1001 (1983) (en banc) (holding that ineffective assistance of counsel at sentencing is within fundamental error review). Therefore, the Petitioner concludes that he has fairly presented his ineffectiveness claims to the state's highest court, who reviewed its merits and implicitly denied the claims. Thus, there has been no default and the claims are not precluded from federal habeas review.

The Petitioner quotes Judge Brown's minute entry that states:

> [T]he issue existed factually prior to appeal; the Arizona Supreme Court looked at the entire sentencing process exhaustively, testing it for error of constitutional dimension and found none. There is therefore the suggestion and strong inference that the claim is precluded under Rule 32.2(a)(2).

(Pima County Superior Court Minute Entry of Mar. 4, 1986 at 4). This, according to Lambright, indicates that Judge Brown found the claims precluded under 32.2(a)(2)--not 32.2(a)(3). Rule 32.2(a)(2) precludes relief for claims that have already been adjudicated. Lambright urges that if Judge Brown's denial rested on the supreme court's consideration of the ineffective claims on direct appeal, then this shows there is no federal bar to a review on the merits.

Assuming the Petitioner is correct that a state court finding of preclusion under Rule 32.2(a)(2) does not bar federal relief, his position is not supported by the stated rationale of Judge Brown's ruling. Upon consideration of Lambright's motion for rehearing on the April 17, 1985 denial of his Rule 32 petition, Judge Brown did not base his finding of preclusion solely on Rule 32.2(a)(2). While Judge Brown acknowledged a "strong inference" that the claim was precluded under 32.2(a)(2), he explicitly made a finding "that since it clearly could have been raised on direct appeal, that it has been knowingly, voluntarily and intelligently waived by failure to raise it, and is therefore precluded pursuant to Rule 32.2(a)(c) [presumably intended as 32.2(a)(3)] and (c)." (Pima County Superior Court Minute Entry of Mar. 4, 1986, at 4-5).

Moreover, this argument was recently considered and rejected by the Ninth Circuit Court of Appeals. "Under Arizona law, fundamental error review does not prevent subsequent procedural preclusion." *Martinez-Villareal v. Lewis,* 80 F.3d 1301, 1306 (9th Cir.1996) (citing *Arizona v. Lopez,* 170 Ariz. 112, 117, 822 P.2d 465, 470 (Ct.App.1991)). ***1561** This Court, as did the Ninth Circuit, finds no merit in this position.

Next, the Petitioner contends that Rule 32.2 is not an adequate state ground to preclude habeas review because his ineffectiveness claims were not known at the time of his direct appeal. Lambright explains that 32.2(b) provided for an exception to rule 32.2(a) preclusion where there "has been a significant change in the law ... and there are sufficient reasons to allow retroactive application of the changed legal standard." Ariz.R.Crim.P. 32.1(g). [FN5] He concludes that *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) constitutes a significant change in the law within the meaning of 32.1(g), and so his ineffective claims are exempted from preclusion.

> FN5. All references to Ariz.R.Crim.P. 32.1 are to the 1956 version which was in effect at the time of Lambright's trial, appeal, and petitions for postconviction relief. The rule was subsequently amended in 1992.

The Petitioner points out that prior to *Strickland,* an Arizona defendant complaining of deficient counsel was required to show that his trial counsel's conduct reduced the proceedings to a farce, sham or mockery of justice. *See Arizona v. Garcia,* 133 Ariz. 522, 652 P.2d 1045 (1982) (en banc). In *Arizona v. Nash,* 143 Ariz. 392, 694 P.2d 222 (en banc), *cert.*

denied, 471 U.S. 1143, 105 S.Ct. 2689, 86 L.Ed.2d 706 (1985), the Arizona Supreme Court recognized that *Strickland* altered the prior Arizona test articulated in *Arizona v. Watson*, 134 Ariz. 1, 4-5, 653 P.2d 351, 354-55 (1982) and it modified *Watson* accordingly. *See Nash*, 143 Ariz. at 397, 694 P.2d at 227 (modifying first prong of two prong test for minimally competent representation to require counsel's actions to have fallen below objective standards of reasonable representation as measured by prevailing professional norms).

Notwithstanding the Arizona Supreme Court's recognition that *Strickland* produced a modified test for minimally competent representation, the court determined the pre- and post-*Strickland* standards were similar. *Nash*, 143 Ariz. at 397, 694 P.2d at 227. The court was directly confronted with the issue of retroactivity of *Strickland* standards in *Arizona v. Gerlaugh*, 144 Ariz. 449, 698 P.2d 694 (1985) (en banc), and declined to apply *Strickland* standards retroactively to a post-conviction case. The court found no case where any court had ever done so, but did discover that many courts had applied effectiveness standards only prospectively. *Gerlaugh*, 144 Ariz. at 456, 698 P.2d at 701 (citing prospective application cases). It stated that the difference between the standards in Arizona before and after *Strickland* "is scarcely outcome determinative," and found no compelling reason to apply the modified standard retroactively. *Id.*

In sum, the *Gerlaugh* court made clear that in Arizona, the *Nash* modification in light of *Strickland* is to be applied prospectively only. That is, the new standard applies only to cases tried or pending appeal after January 9, 1985, the date *Nash* was decided. *Id.* Lambright's trial and appeal were completed well before January, 1985. Therefore, there has been no significant change in the law and there are no sufficient reasons to allow retroactive application of the changed legal standard under Ariz.R.Crim.P. 32.1(g), 32.2(b).

Similarly, Lambright also posits that his waiver of his ineffectiveness claims could not have been knowing and voluntary under Rule 32.2(a)(3) because *Strickland* had not been decided at the time of his direct appeal. A claim is not procedurally defaulted from post-conviction review if the claim not raised on appeal was a constitutional issue unknown at the time of the appeal. *Myers v. Washington*, 646 F.2d 355, 359-60 (9th Cir.1981), *judgment vacated on other grounds*, 456 U.S. 921, 102 S.Ct. 1964, 72 L.Ed.2d 436 (1982). Appellate counsel cannot be expected to "anticipate how constitutional law would evolve over the next twenty years," and he

need not fear omitting "what appears at the time to be a futile constitutional argument." *Id.* at 360.

That is clearly not the situation in this instance. As noted above, the pre- and post-*Strickland* standards were similar. *Myers* addressed the situation where the constitutional issue was one that had not been previously identified. *Id.* at 359. ***1562** Lambright acknowledges that competence of counsel existed as a constitutional issue well before his case began. *Strickland* itself instructed that cases decided under different standards need not be reassessed in the light of the changes in the test for ineffective assistance of counsel. *Strickland,* 466 U.S. at 696, 104 S.Ct. at 2068-69. Further, the Second Circuit has observed that, after years of applying the farce, sham and mockery and minimal competency tests, the court has never found a case that turned on the choice of standard. *Trapnell v. United States,* 725 F.2d 149, 153 (2d Cir.1983). This case does not either.

Lambright next contends that *Kimmelman v. Morrison,* 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986) suggests that a state court's procedural rules should be relaxed where the claim is one of ineffective assistance of counsel. That case noted that when the same lawyer represents the defendant at trial and on direct appeal, there is little chance for ineffectiveness issues to be discovered. A lawyer cannot easily recognize his own errors and a lay defendant probably could not without consulting separate counsel. *Id.* at 378 (refusing to extend *Stone v. Powell,* 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976) to bar Sixth Amendment habeas corpus action where the claimed ineffectiveness was the failure to challenge an alleged Fourth Amendment violation).

Those concerns do not exist in Mr. Lambright's case. He was represented by separate counsel on appeal. The factual basis existed and could have been presented by appellate counsel. The choice not to do so does not call for any relaxation of the state's procedural rules. Any complaint that the direct appellate process is insufficient due to its limited ability to conduct fact- finding should have been addressed to the appellate court, who could, and frequently did in other cases, stay its proceeding to allow fact-finding in the trial court. Had Lambright desired to present mitigation evidence, the appellate court could have returned the claim to the trial court for that purpose. His failure to raise the issue prevented the appellate court from so directing or otherwise considering the claim. Lambright's ineffective claim would not have been forfeited, had he followed the established procedure explained in *Watson* and *Carriger.* In sum, Lambright was provided a real

and meaningful opportunity to make his ineffectiveness claim on direct appeal. That opportunity was not so ill-defined as to justify excusing Lambright's failure. He suffered no violation of his rights to due process in being required to present the claim first on direct appeal.

Lambright next argues that the state rule is not adequate because it has not been regularly and consistently applied by Arizona courts. He correctly points out that a state rule, to be an adequate ground barring federal review, must be firmly established and regularly applied at the time of the default. *Ford v. Georgia,* 498 U.S. 411, 423-24, 111 S.Ct. 850, 857, 112 L.Ed.2d 935 (1991); *Dugger v. Adams,* 489 U.S. 401, 109 S.Ct. 1211, 103 L.Ed.2d 435 (1989); *Hathorn v. Lovorn,* 457 U.S. 255, 262-63, 102 S.Ct. 2421, 2426-27, 72 L.Ed.2d 824 (1982); *Harmon v. Ryan,* 959 F.2d 1457 (9th Cir.1992). Referring to six state cases, Lambright attempts to illustrate Arizona's failure to consistently apply Rule 32.2(a)(3) to claims of incompetent counsel.

It is interesting to note that of the six cases Lambright cites, only two address the issue of procedural bar under Rule 32.2. Neither of those cases are helpful to Lambright's position. In *Arizona v. Scrivner,* 132 Ariz. 52, 643 P.2d 1022 (Ct.App.1982), the appellate court found the ineffectiveness claim raised for the first time in a post-conviction petition procedurally barred due to waiver. This is proper and consistent with the state supreme court rulings of the time, as discussed above. The second case relied upon by Lambright that addresses procedural bar is *Arizona v. Carriger,* 132 Ariz. 301, 645 P.2d 816 (1982). In that case, the supreme court rejected the government's contention that the ineffectiveness claim was procedurally barred. The basis of that bar was 32.2(a)*(2)*--not 32.2(a)*(3)*. Rule 32.2(a)(2) bars only those claims that were raised and considered by the appellate court. As such, *Carriger* is inapposite.

Perhaps more importantly, the Ninth Circuit recently made clear that the ***1563** contention that the Arizona Supreme Court has not regularly and consistently relied on procedural default has no merit. *See Carriger v. Lewis,* 971 F.2d 329, 333 (9th Cir.1992), *cert. denied,* 507 U.S. 992, 113 S.Ct. 1600, 123 L.Ed.2d 163 (1993) (rejecting argument that Arizona's reliance on procedural default was so unpredictable and irregular that it does not provide an adequate ground for disposing of claims).

Martinez-Villareal v. Lewis, 80 F.3d 1301, 1306 (9th Cir.1996) (parallel citation and additional history omitted, style added). Lambright's argument

that the Arizona Supreme Court did not consistently and regularly apply Rule 32.2(a)(3) is unavailing. [FN6]

> FN6. Lambright also cites a ruling of this Court in *McMurtrey v. Lewis,* CIV 88-844 TUC RMB, wherein the Court stated that "the State has provided no authority, nor is the Court aware of any case, which mandates that if a defendant does not raise ineffective assistance of trial counsel on direct appeal, he or she is procedurally barred from doing so in the post-conviction petition." Order of Mar. 2, 1994 at 4. The most important of the distinctions between McMurtrey and Lambright is the crucial fact that Lambright was represented by separate counsel on appeal.

The Petitioner next challenges the trial court's finding that he had knowingly and voluntarily waived the ineffectiveness claim by failing to raise it on direct appeal.

Failure to comply with Rule 32 procedures results in a determination that the petitioner waived his right to present a Rule 32 petition. *Arizona v. Herrera,* 121 Ariz. 12, 588 P.2d 305 (1978) (en banc), *cert. denied,* 441 U.S. 949, 99 S.Ct. 2175, 60 L.Ed.2d 1054 (1979). Rule 32.2(c) allows for the inference of a waiver where a petitioner does not raise a claim on appeal after having been advised of his right to do so by the sentencing judge. The sentencing judge need not identify every possible appellate issue that could be available. Judge Brown noted on the record that an appeal would be automatically filed. Lambright was appointed appellate counsel. No provision of Rule 32 created an exception for ineffectiveness claims that would remove them from the Rule 32.2(a)(3) requirement of raising all available issues on direct appeal.

The Petitioner's self-serving affidavit that he did not know that he was required to raise ineffectiveness claims on direct appeal does not overcome the inference of waiver. *Arizona v. Wilson,* 179 Ariz. 17, 20, 875 P.2d 1322, 1325 (Ct.App.1993). While he claims to have been unaware of the requirement, he did request separate counsel for his direct appeal.

His appellate counsel's affidavit states that counsel was not aware of a procedural rule requiring ineffectiveness claims be brought on direct appeal and he did not so inform Lambright. Appellate counsel would have indeed been hard pressed to find a procedural rule that specifically stated that ineffective assistance of counsel claims must be raised on direct appeal.

"The type of issues an appellant can raise in an appeal and the number of issues an appellant can raise are not limited by a per se rule. Cf. Ariz. Const.Art. 2, s 24; A.R.S. s 13-4031; Rule 31.13(c)(1)(iv) (none of which set any limits on appeal)." *Arizona v. Carriger,* 143 Ariz. 142, 692 P.2d 991 (1984) (en banc), *cert. denied,* 471 U.S. 1111, 105 S.Ct. 2347, 85 L.Ed.2d 864 (1985). There is no case or rule that exhausts the list of possible issues to be raised on appeal. Rather, there is a body of Arizona Supreme Court law which, as discussed above, required presentation of ineffectiveness claims on direct appeal. Further, Rule 32 provides that unless a claim is exempted, if it could have been brought on direct appeal, it is included in 32.2(a)(3). The appellate lawyer stated in his affidavit that he would have raised ineffectiveness on appeal had he reviewed the record under *Strickland.* This indicates that Lambright's appellate counsel knew that ineffectiveness *could* be raised on direct appeal. The mere fact that counsel failed to recognize the factual or legal basis for a claim or failed to raise the claim despite recognizing it does not overcome a procedural default. *Murray v. Carrier,* 477 U.S. 478, 487-89, 106 S.Ct. 2639, 2645-46, 91 L.Ed.2d 397 (1986).

Whether Judge Brown found a waiver based upon an inference from 32.2(c) or from the circumstances, his conclusion is supported by the record. Moreover, "a finding of procedural default requires only that the ***1564** claim was rejected by the state court on independent and adequate state procedural grounds." This Court need not specifically decide that Judge's Brown's finding was factually correct. *Martinez-Villareal v. Lewis,* 80 F.3d 1301, 1307 (9th Cir.1996). The trial court judge did not err in finding that Lambright had waived his right to present the ineffectiveness claim in a Rule 32 petition.

Lambright's efforts to avoid procedural default are unavailing. His failure to raise his claim of ineffective assistance of counsel on direct appeal resulted in that claim being barred from collateral review pursuant to Rule 32.2(a)(3). That rule is an adequate, independent state law ground that precludes the federal habeas court from reaching the merits of the claim. However, despite Lambright's failure to properly raise his claim on appeal, this Court would excuse the procedural default and consider the claim on the merits if cause and prejudice is established or a fundamental miscarriage of justice would result. *Sawyer v. Whitley,* 505 U.S. 333, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992); *Noltie v. Peterson,* 9 F.3d 802, 804-05 (9th Cir.1993).

B. Cause and Prejudice

A federal habeas court will not review a claim that the state court has found procedurally defaulted unless the petitioner can demonstrate cause and prejudice, *Wainwright v. Sykes,* 433 U.S. 72, 87, 97, 97 S.Ct. 2497, 2506-07, 2511-12, 53 L.Ed.2d 594 (1977), or a fundamental miscarriage of justice. *Murray v. Carrier,* 477 U.S. 478, 494-95, 106 S.Ct. 2639, 2648-49, 91 L.Ed.2d 397 (1986); *Engle v. Isaac,* 456 U.S. 107, 109, 102 S.Ct. 1558, 1562, 71 L.Ed.2d 783 (1982).

Cause excusing default in this context is an objective factor, not fairly attributed to the Petitioner, *Coleman v. Thompson,* 501 U.S. 722, 753, 111 S.Ct. 2546, 2566-67, 115 L.Ed.2d 640 (1991), where the factual or legal basis for a claim was not reasonably available to counsel at the time. *Id.* Ignorance of the prevailing law or inadvertent omission/mistake in failing to raise certain claims on appeal does not constitute cause. *Murray v. Carrier,* 477 U.S. 478, 488, 106 S.Ct. 2639, 2645-46, 91 L.Ed.2d 397 (1986). "[T]he existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Id.* at 478, 106 S.Ct. at 2645.

One way to establish cause is to show that "a constitutional claim is so novel that its legal basis is not reasonably available to counsel." *Reed v. Ross,* 468 U.S. 1, 16, 104 S.Ct. 2901, 2910, 82 L.Ed.2d 1 (1984). [FN7] In *Reed,* the petitioner's failure to appeal a jury instruction was excused because at the time, there was no question as to the instruction's validity. It was not questioned until years later and was eventually struck down by the U.S. Supreme Court in *Mullaney v. Wilbur,* 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975). The absolute lack of legal basis for the claim at the time constituted good cause for failing to raise the issue on appeal. In such a case, there is little concern that the federal habeas court would be unduly encroaching upon the state courts' interest in enforcing its procedural rules. *Dugger v. Adams,* 489 U.S. 401, 409, 109 S.Ct. 1211, 1216-17, 103 L.Ed.2d 435 (1989).

> FN7. *See also Deutscher v. Whitley,* 884 F.2d 1152, 1156 (9th Cir.1989) (determining that cause exists if novel claim had no reasonable basis in law at the time of the default), *vacated on other grounds,* 500 U.S. 901, 111 S.Ct. 1678, 114 L.Ed.2d 73 (1992).

Lambright makes this argument, again suggesting that *Strickland,* which was decided after Lambright's direct appeal, created the legal basis for his claim. *Strickland* did not contemplate such a result, and to the contrary, instructed that cases previously decided under differing standards need not be reconsidered in the light of *Strickland'* s changes. *Strickland v. Washington,* 466 U.S. 668, 696-97, 104 S.Ct. 2052, 2069-70, 80 L.Ed.2d 674 (1984). As explained above, the legal basis for a claim of ineffective assistance of counsel existed well before *Strickland* and well before Lambright's trial. The legal basis for Lambright's ineffectiveness claims was available and was well grounded in principle. This contention fails to establish ***1565** cause for failing to raise the claim on direct appeal.

Lambright also contends that he did not raise ineffectiveness of counsel on appeal because it was impossible to do so. His claim could not be found within the record, but rather required an evidentiary hearing in order to bring forth the facts relevant to counsel's performance. The fact-finding process of an evidentiary hearing is not conventionally available on appeal. Lambright, correctly notes that direct appeal is limited to matters appearing in the trial court record. *Arizona v. Caldwell,* 117 Ariz. 464, 573 P.2d 864 (1977) (en banc). Therefore, Lambright concludes, it was practically impossible for him to have raised his ineffectiveness claim, as it depended on development of matters outside the record.

Lambright is wrong in his belief that it would have been practically impossible to raise the claim on direct appeal. As discussed above, the appellate courts were, during the relevant time period, routinely allowing ineffectiveness claims on appeal and returning the claims to the trial court for fact-finding if necessary. The Ninth Circuit has refused to apply a special standard to ineffectiveness claims, and requires that they be properly raised like all other claims in order to avoid default. "Wainright is equally applicable to ineffectiveness claims." *Carriger v. Lewis,* 971 F.2d 329, 334 (9th Cir.1992) (citing *Harris v. Reed,* 489 U.S. 255, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989), *cert. denied,* 507 U.S. 992, 113 S.Ct. 1600, 123 L.Ed.2d 163 (1993)). Also, futility is insufficient to establish cause. *Engle v. Isaac,* 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982). Arizona offered a procedure for Lambright to raise his claim, but he did not avail himself of that procedure.

Ineffectiveness of *appellate* counsel is cause for excusing procedural default. *Murray,* 477 U.S. at 488, 106 S.Ct. at 2645-46. The Petitioner does not specifically argue that appellate counsel's performance is cause for

his failure to raise the trial counsel ineffectiveness claim on appeal, but he does claim that appellate counsel's alleged numerous shortcomings are independent instances of ineffective assistance of counsel. This claim was also defaulted in the state court by Lambright's failure to raise the claim in his first two Rule 32 petitions. Before an ineffectiveness claim may be used to establish cause for a procedural default, the claim must be properly presented to the state court as an independent claim. *Murray*, 477 U.S. at 488-89, 106 S.Ct. at 2645-46. Lambright did not present the appellate counsel claim in the state court as required by Rule 32. Accordingly, that claim is procedurally barred and cannot be used to establish cause for the prior default of not raising the trial counsel claim on direct appeal.

Under Lambright's logic, he would be forced to claim ineffective assistance of collateral post-conviction relief counsel. After all, it was the Rule 32 counsel who failed to raise ineffective assistance of appellate counsel in either of the first two Rule 32 petitions. There is no right to counsel in Rule 32 proceedings, so there is no constitutional implication. *Pennsylvania v. Finley*, 481 U.S. 551, 556, 107 S.Ct. 1990, 1993-94, 95 L.Ed.2d 539 (1987) (denying right to counsel in state collateral proceedings after completion of direct review); *Coleman v. Thompson*, 501 U.S. 722, 752, 111 S.Ct. 2546, 2566, 115 L.Ed.2d 640 (1991) (declaring no constitutional right to any attorney in state post-conviction proceedings, so attorney error in those proceedings cannot amount to ineffective assistance of counsel and therefore may not constitute cause); *Bonin v. Vasquez*, 999 F.2d 425, 429-30 (9th Cir.1993) (ruling that attorney error at post-conviction proceeding is not cause). Lambright has not demonstrated any cause for excusing his defaults.

While a court need not examine the existence of prejudice once the petitioner fails to establish cause, *Engle v. Isaac*, 456 U.S. 107, 134 n. 43, 102 S.Ct. 1558, 1575 n. 43, 71 L.Ed.2d 783 (1982); *Thomas v. Lewis*, 945 F.2d 1119, 1123 n. 10 (9th Cir.1991), the Court does so in this case in the interest of thorough consideration of Lambright's position and as an alternative or additional reason ***1566** for refusing to excuse Lambright's procedural default. [FN8]

> FN8. Lambright continues to argue that he needs funds to research the ineffectiveness claims, and that a showing a prejudice is dependent on his research. The Court again denies the request for funds and for an evidentiary hearing. Lambright has not satisfied the cause prong. A federal evidentiary hearing is not required

unless the Petitioner can show "cause for his failure to develop the facts in state-court proceedings and actual prejudice resulting from that failure," or that "a fundamental miscarriage of justice would result from failure to hold a federal evidentiary hearing." *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 11-12, 112 S.Ct. 1715, 1721, 118 L.Ed.2d 318 (1992). Without a showing of cause, this Court will not direct a hearing. *See Brown v. Easter*, 68 F.3d 1209, 1211 (9th Cir.1995) (district court's refusal to conduct an evidentiary hearing permissible in the absence of a showing of cause).

To establish prejudice in order to excuse default, a petitioner must show "not merely that the errors at trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting the entire trial with error of constitutional dimensions." *United States v. Frady*, 456 U.S. 152, 170, 102 S.Ct. 1584, 1595, 71 L.Ed.2d 816 (1982). But for the alleged error, the petitioner might not have been convicted. *Reed v. Ross*, 468 U.S. 1, 12, 104 S.Ct. 2901, 2908, 82 L.Ed.2d 1 (1984). This means that actual harm must have resulted from the alleged constitutional violation. *Thomas v. Lewis*, 945 F.2d 1119, 1123 (9th Cir.1991).

Lambright cannot make this showing because there is nothing to suggest that the outcome of the trial or sentencing would have been different but for the alleged errors of counsel. That is due to the overwhelming evidence of Lambright's guilt and of the especially cruel and heinous nature of his crimes.

At Lambright's sentencing, Judge Brown made detailed findings. He found that Lambright killed for gratification, in a way sure to terrorize the victim. He wrenched the knife around inside Ms. Owen after repeatedly stabbing her in the chest and abdomen. He twisted the knife deep into her body, to either cause more damage or more pain. Lambright cut her throat so deeply that the knife penetrated the vertebrae. When she tried hopelessly to raise herself up on one arm, Lambright smashed her in the head with a rock. He later said, "Did you see her head bounce when I hit it with that rock?" He deliberately took Ms. Owen to that desolate location to kill her and to avoid detection. Afterward, he celebrated with the others. This Court does not find cause or prejudice for Lambright's defaults.

For these same reasons, this Court's refusal to reach the merits does not result in a fundamental miscarriage of justice. This is not an extraordinary case where a constitutional violation has probably resulted in the conviction

and death sentencing of an innocent person. Lambright has not made a colorable showing of actual innocence as required by *McCleskey v. Zant*, 499 U.S. 467, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991) and *Herrera v. Collins*, 506 U.S. 390, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993). Actual innocence with respect to the death penalty focuses on the factors which make a defendant eligible for a death sentence. It does not focus on additional mitigating evidence which was not introduced at trial. *Sawyer v. Whitley*, 505 U.S. 333, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992). [FN9] There is no cause, no prejudice, and no miscarriage of justice.

> FN9. *See also Harris v. Vasquez*, 949 F.2d 1497, 1515-16 (9th Cir.1990) (new psychological evidence may not be sufficient to show actual innocence of offense or of death sentence), *cert. denied*, 503 U.S. 910, 112 S.Ct. 1275, 117 L.Ed.2d 501 (1992); *Clark v. Lewis*, 1 F.3d 814, 824-25 (9th Cir.1993) (newly discovered evidence may not be sufficient to show actual innocence of the death penalty).

II. TRIAL CLAIMS (Claims 1-10)

A. Lesser Included Offenses Instruction (Claim 1)

Lambright argues that the jury should have been instructed on the lesser included offenses to first degree murder. Based upon his statements to law enforcement officers, Lambright believes that the jury could have, if properly instructed, concluded that Lambright's participation was not premeditated and that he was guilty of only a lesser crime ***1567** of second degree murder, aggravated assault or simple assault.

The problem for Mr. Lambright is again procedural default. He did not raise this issue in the state court until his second Rule 32 petition filed on November 3, 1991, and amended on March 13, 1992. The Rule 32 court rejected this claim, going so far as to amend the order denying relief to make clear that the ruling was based upon preclusion. Judge Brown amended his prior ruling that relied upon a "death is different" concept to find the claim barred by state law, but yet required a consideration of the merits of the claim. The amended order of April 9, 1993 contains a clear and express statement that Judge Brown relied on Rule 32 to deny the claim. The consideration of the merits was an alternative rationale for denying the claim. *See* Order of Apr. 9, 1993 at 2 ("he has waived the right to assert this claim in this petition and the claim is precluded"). For all the reasons

discussed above in Part I, the Petitioner has defaulted on this claim and has not demonstrated cause and prejudice to overcome the procedural default. This Court is precluded from considering the merits of the claim.

Lambright urges this Court to consider his trial claims in light of the performance of his trial counsel. He stresses that the trial errors cannot be viewed in a vacuum, but must be tested with an eye toward the ineffectiveness claims. While the Court agrees that thorough review demands a consideration of all the circumstances and the entire record, this Court is prevented from considering the ineffectiveness claims. As explained above, before ineffectiveness may be used to establish cause for a procedural default, the ineffectiveness claim must be properly presented to the state court as an independent claim. Lambright's failure to do so precludes federal consideration of ineffectiveness as cause for the default of this trial claim. The claim that the trial court erred in failing to instruct the jury on lesser included offenses is precluded and must be denied.

Even if this claim were not precluded, it would be denied on the merits based upon *Hopper v. Evans,* 456 U.S. 605, 102 S.Ct. 2049, 72 L.Ed.2d 367 (1982) (no constitutional requirement to instruct upon lesser-included offenses not supported by the evidence) and *Schad v. Arizona,* 501 U.S. 624, 111 S.Ct. 2491, 115 L.Ed.2d 555 (1991) (premeditation and felony murder are not separate offenses requiring separate verdicts). Trial claim 1 is precluded and is alternatively denied on the merits.

B. Felony Murder Jury Instruction

In trial claim 2, Lambright posits that the trial court instructed the jury on felony murder in such a way that improperly characterized the burden of proof. That is, the State was relieved of its burden of proving the "in furtherance of" element of felony murder. This, says Lambright, is a violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

This claim suffers the same infirmity as trial claim 1. This claim was found waived and barred by the Rule 32 court, and thus its merits may not be addressed by this Court. This claim too must be denied.

C. Dual Juries (Claim 3)

The trial court severed the cases of Smith and Lambright, upon defense request. It held a joint trial with separate juries for each defendant. Lambright argues in trial claim three that this dual jury procedure violated the Eighth and Fourteenth Amendments to the United States Constitution. Specifically, he contends that Smith's defense strategy was to blame Lambright. Lambright's cross-examination of witnesses would always follow that of Smith, so Smith had the opportunity to blame Lambright first during cross-examination. Also, errors made during Smith's cross-examinations "rubbed off" onto Lambright. Further, the trial judge's warning to the jury that some evidence was admissible only against Smith must have introduced jury speculation each time they were removed from the courtroom. Lastly, Lambright argues that state law did not allow for dual juries. Violation of state law constitutes a violation of his federal constitutional right ***1568** to due process under the Fourteenth Amendment.

The State responds that while Lambright raised the issue of dual juries on direct appeal, he now raises new allegations in his amended petition that were not presented to the state court. On appeal the bases for the dual jury claim were that there was no separate defense table, that there was the possibility of impermissible jury speculation on inadmissible evidence presented to Smith's jury, and that the dual jury procedure was not provided by state law. For the first time, Lambright now presents as bases for the dual jury claim, the "rub off" from the cross-examinations and a due process requirement that a state comply with its own procedures. The Respondents characterize these new bases as sub-claims and argue that they are not exhausted because they have never been presented to any state court.

The Respondents are correct. The factual and legal basis for a claim must be presented to the state court so that the state has a reasonable opportunity to address the claim and correct any violation of federal rights. *Duncan v. Henry,* 513 U.S. 364, ----, 115 S.Ct. 887, 888, 130 L.Ed.2d 865 (1995) (per curiam); *Crotts v. Smith,* 73 F.3d 861, 865 (9th Cir.1996). Merely raising a claim without the pertinent supporting facts and law does not provide the state a fair opportunity to consider the claim. *See Keeney v. Tamayo-Reyes,* 504 U.S. 1, 112 S.Ct. 1715, 118 L.Ed.2d 318 (1992) (state prisoner must show cause and prejudice for failing to raise same claims and to develop supporting facts in state court). [FN10]

> FN10. To exhaust a federal claim, a petitioner should make essentially the same arguments before the state and federal courts. *Tamapua v. Shimoda,* 796 F.2d 261, 262 (9th Cir.1980). Raising

one specific claim under a heading, such as ineffective assistance of counsel, does not exhaust other specific claims with that same title. *Carriger v. Lewis*, 971 F.2d 329, 333 (9th Cir.1992), *cert. denied*, 507 U.S. 992, 113 S.Ct. 1600, 123 L.Ed.2d 163 (1993). A claim may be considered unexhausted where new facts are alleged that were not presented to the state courts. *Chacon v. Wood*, 36 F.3d 1459, 1467 (9th Cir.1994).

While the use of one defense table for all defendants in a criminal trial may fall well within federal law, a subordinated cross- examination by one of the defendants may not. This Court does not so rule at this time, but only points out that claims are dependent upon their factual and legal background and are not sustained based upon broad headings or titles. Mr. Lambright did not present the operative facts to the state court which would have allowed the state court to apply controlling legal principles to the facts bearing on the claim. He has therefore not exhausted his claim that the cross-examination order and its effects violated his constitutional rights. He also has not exhausted his claim that the use of dual juries without such a state procedure constituted a violation of his rights of due process.

Notwithstanding Lambright's failure to properly exhaust these claims, this Court will treat them as technically exhausted. Too much time has been lost in this case. Lambright's previous failures in satisfying the exhaustion requirement have resulted in nearly nine years of delay. The State, the victims, the Petitioner, and the federal system is owed better. The Court will not allow Mr. Lambright to once again return to the state court in effort to exhaust this claim.

The President recently signed into law Title I, Habeas Corpus Reform, as part of the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104-132, 110 Stat. 1214 (1996). Section 104 of Title I amends 28 U.S.C. § 2254, allowing a federal habeas court to deny a writ of habeas corpus on the merits, despite failure to exhaust available state remedies. 110 Stat. 1214, 1218. This power to *deny* a claim appears consistent with a respect for the states' role in remedying federal violations. Title I does not confer the power to *grant* a writ in the absence of exhaustion. This leaves intact the state's ability to correct constitutional violations in the first instance. The federal courts will not grant a writ without state consideration of the federal claim. Ostensibly, Title I authorizes the actions of this Court today in moving beyond Lambright's failure to exhaust his state remedies.

***1569** While the Court takes this step with the awareness of Title I, it does not do so upon sole reliance of Title I. The applicability and implications of this new law are far from clear at this point. Rather, this Court additionally bases its decision to excuse the failure to exhaust on *Coleman v. Thompson*, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991) and its progeny. *Colemans'* first footnote explains:

> This rule [of requiring an express statement of state reliance on independent, adequate state law grounds] does not apply if the petitioner failed to exhaust state remedies and the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred. In such a case there is a procedural default for purposes of federal habeas regardless of the decision of the last state court to which the petitioner actually presented his claims.

Coleman, 501 U.S. at 735 n. 1, 111 S.Ct. at 2557 n. 1. [FN11]

> FN11. *See also Harmon v. Ryan*, 959 F.2d 1457, 1460 (9th Cir.1992) (a state prisoner can meet the exhaustion requirement by showing that no state remedies remain available); *Acosta-Huerta v. Estelle*, 7 F.3d 139, 142 (9th Cir.1993) (federal habeas court may consider unexhausted claims that do not rise to the level of constitutional violations).

What this means to Lambright is that if this Court were to require proper exhaustion, he would return once again to the state court for consideration of this claim. The state court would find him procedurally barred from relief due to Rule 32.2. This is because he did not raise the bases for the claim on direct appeal. Further, he did not raise the claim at all in his previous collateral proceedings petitions. It would therefore cause unnecessary further delay without benefit. The state court would not reach the merits of the claim, so Lambright has both technically exhausted and procedurally defaulted the claim.

So, while lack of proper exhaustion does not prevent federal consideration, procedural default does. Because the state court would determine, should Lambright return there with this claim, that he has procedurally defaulted under Rule 32, he has in fact, in this Court, defaulted the claim based upon cross-examination and state law violation as a due process violation. The cause suggested for this default is again, trial

counsel's alleged incompetency. As stated above, ineffectiveness of counsel cannot establish cause where the ineffectiveness claim has not been presented to the state court as an independent claim. *Murray v. Carrier*, 477 U.S. 478, 488-89, 106 S.Ct. 2639, 2645, 91 L.Ed.2d 397 (1986). The Petitioner has failed to establish cause and prejudice to overcome the procedural default and as such, the claim must be denied.

What remains then is the aspect of trial claim 3 which contends that jurors were impermissibly allowed to speculate upon evidence that was presented to Smith's jury. The Arizona Supreme Court criticized Judge's Brown [sic] use of two juries, concluding that the use of dual juries was the creation of a local rule not explicitly authorized by the state rules of criminal procedure. This exceeded the trial court's discretion, but did not result in any actual prejudice to Mr. Lambright. Although the practice was condemned as an unauthorized procedure, it was not condemned as violative of the United States Constitution and was not reversible error in Lambright's case. *Arizona v. Lambright*, 138 Ariz. 63, 673 P.2d 1, 8 (1983), *cert. denied*, 469 U.S. 892, 105 S.Ct. 267, 83 L.Ed.2d 203 (1984).

The state supreme court revisited this issue in *Hedlund v. Sheldon*, 173 Ariz. 143, 840 P.2d 1008, 1011 (1992) (en banc). Overruling *Lambright*, the court determined that the decision to utilize two juries "is not a rule at all." Rather, it is 'the exercise of an individual judge's discretion to use a particular technique in order to meet a specific problem' in a single case." *Hedlund*, 173 Ariz. at 147, 840 P.2d at 1011 (quoting *Lambright*, 138 Ariz. at 71, 673 P.2d at 16 (Feldman, J., specially concurring)). A trial judge may employ innovative techniques, while being sensitive to the unique difficulties of a capital case. *Id.*

The Ninth Circuit agrees that capital cases can present special problems. In *Beam v. Paskett*, 3 F.3d 1301, 1304 (9th Cir.1993), ***1570** *cert. denied sub nom., Arave v. Beam*, 511 U.S. 1060, 114 S.Ct. 1631, 128 L.Ed.2d 354 (1994), the court held that, in a non-capital case, the use of dual juries does not constitute a per se violation of the defendant's rights under the Fifth, Sixth and Fourteenth Amendments. It did not however, determine whether this would hold true in a capital case. Since it vacated Beam's death sentence on other grounds, the court did not decide whether the use of dual juries in a case where death was imposed would be unconstitutional. *Id.* at 1303. The court did, nonetheless, note that capital cases require "exacting constitutional scrutiny" because a life will be taken. *Id.* at 1304. The Ninth Circuit recognized:

> The dual jury procedure introduces additional complexity and likelihood of error into the trial and thereby impairs a defendant's ability to conduct his defense. For this reason, a dual jury verdict is inherently more dubious than an ordinary verdict--even in the absence of a showing of specific prejudice.

Id. Mr. Lambright cites to this passage, arguing that *Beam* instructs that there is no need for actual prejudice when a defendant receives the death penalty. A capital case, with its unique problems, and unlike a case where death is not imposed, does not require a showing that the verdict was unreliable. Because a dual jury verdict is inherently more dubious, it is inherently prejudicial. This Court disagrees.

What *Beam* teaches is that a death penalty case is different, not in its procedures, but in the severity of the punishment. Because the ultimate penalty will be imposed, the trial court must be particularly vigilant in ensuring that the penalty will not be imposed in the absence of a reliable verdict of guilt. *Beam* continued:

> The degree of unreliability is not dependent, however, upon whether the trial is a capital one or not. Cf. Beck v. Alabama, 447 U.S. 625, 642-43, 100 S.Ct. 2382, 2393, 65 L.Ed.2d 392 (1980) (stating that jury verdicts following a failure to give a lesser included offense instruction are inherently more suspect in capital than non-capital trials). Whatever additional constitutional constraints exist on the uses of dual juries in capital trials would be a consequence of the greater reliability demanded of verdicts upon which a sentence of death is based, and not upon any additional uncertainty created by the fact that the trial is capital in nature.

Id. Death is different. *Beck v. Alabama,* 447 U.S. 625, 637, 100 S.Ct. 2382, 2390, 65 L.Ed.2d 392 (1980). "There is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment." *Woodson v. North Carolina,* 428 U.S. 280, 305, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976). It therefore appears then, that although a dual jury *may* produce a more suspect verdict, if the verdict is reliable, there is no constitutional violation--whether or not the case is a capital one.

No court has held that multiple jury empanelment in a capital case is inherently prejudicial. The federal appellate courts having considered dual juries were reviewing non-capital cases, and all have approved the practice.

In the absence of actual prejudice, the courts considering this issue agree that in a non-capital case, dual juries do not offend the Constitution. *See, e.g., United States v. Sidman,* 470 F.2d 1158 (9th Cir.1972) (upholding the multiple jury procedure where the trial judge carefully instructed the panels), *cert. denied,* 409 U.S. 1127, 93 S.Ct. 948, 35 L.Ed.2d 260 (1973); *United States v. Hayes,* 676 F.2d 1359, 1367 (11th Cir.) (concurring with *Sidman* and affirming convictions due to lack of prejudice flowing from multiple juries), *cert. denied,* 459 U.S. 1040, 103 S.Ct. 455, 74 L.Ed.2d 608 (1982); *Byrne v. Matczak,* 254 F.2d 525, 529 (3d Cir.) (ruling novel use of multiple juries not unconstitutional without particularized harm), *cert. denied,* 358 U.S. 816, 79 S.Ct. 24, 3 L.Ed.2d 58 (1958); *United States v. Crane,* 499 F.2d 1385 (6th Cir.) (upholding multiple jury procedure as constitutional in the absence of specific prejudice), *cert. denied,* 419 U.S. 1002, 95 S.Ct. 322, 42 L.Ed.2d 278 (1974); *United States v. Rowan,* 518 F.2d 685, 690 (6th Cir.) (requiring showing of substantial prejudice to overrule trial court's discretion), *cert. denied sub nom. Jackson v. United States,* 423 U.S. 949, 96 S.Ct. 368, 46 L.Ed.2d ***1571** 284 (1975); *United States v. Rimar,* 558 F.2d 1271, 1272 (6th Cir.) (finding confusion resulting from dual juries not so pervasive as to render the trial unfair), *cert. denied sub nom. Barber v. United States,* 434 U.S. 984, 98 S.Ct. 609, 54 L.Ed.2d 478 (1977); *United States v. Lebron-Gonzalez,* 816 F.2d 823, 830-31 (1st Cir.) (finding no abuse of discretion in having two juries in the absence of a strong showing of prejudice), *cert. denied,* 484 U.S. 843, 108 S.Ct. 135, 98 L.Ed.2d 92 *and cert. denied sub nom. Fonfrias v. United States,* 484 U.S. 857, 108 S.Ct. 166, 98 L.Ed.2d 120 (1987).

Today this Court takes the next logical step, and holds that actual prejudice is required in capital cases, just as it is required in non- capital cases. A constitutional violation occurs only where a criminal defendant demonstrates particularized harm from the use of multiple juries. Death is indeed different in the reliability needed, but not in the procedures employed to serve the ends of justice.

Lambright has not demonstrated that the verdict finding him guilty was unreliable. He merely conjectures that there was a "possibility" that jurors could "speculate" on evidence they did not hear. Because the judge cautioned both juries that some evidence was admissible only against Smith, Lambright concludes that his jury must have impermissibly speculated on the evidence presented against Smith outside their presence. He complains about the potential prejudicial "rub-off" but does not cite any instances

showing such actual prejudice. Such a generalized allegation is insufficient.

Additionally, the Court's own efforts of searching the record in conduct of "exacting constitutional scrutiny," reveals no circumstances that call in to doubt the jury's verdict. The trial judge carefully explained the roles of the two juries and instructed them accordingly. He excused Lambright's jury during Smith's opening statements and closing arguments and instructed the juries separately. The court excused Lambright's jury during the testimony concerning Smith's confession and ensured that the juries deliberated separately. His explanation of this process to the juries was designed to alleviate confusion or prevent speculation. In sum, he carefully protected Mr. Lambright's right to a fair trial, while preserving judicial resources.

As discussed above, there was overwhelming evidence of Mr. Lambright's guilt and of the cruel and heinous nature of his crimes. The detailed testimony of his conspiring lover and his own incriminating statements belie any suggestion of innocence. The verdict was supported by the evidence and can be relied upon to know that Lambright murdered Sandra Owen. As Lambright suffered no actual prejudice from the use of dual juries, trial claim three fails on the merits.

D. Limited Recross-Examination (Claim 4)

In trial claim 4 Lambright submits that the trial court improperly restricted his cross-examination of Kathy Foreman, in violation of the Sixth and Fourteenth Amendments. The State responds that this too, is precluded from federal review due to unexcused procedural default. The State is correct.

Lambright simply reasserts the same reasons for avoiding default that the Court has addressed above. The state court found the claim precluded because it was not raised on direct appeal. The only cause put forth is ineffectiveness of trial counsel, which may constitute cause only where the issue was raised independently in the state court. Lambright did not raise ineffectiveness on direct appeal as an independent claim. Trial claim 4 is precluded from federal review.

E. County Attorney as Witness (Claim 5)

Lambright contends in trial claim 5, that his Sixth and Fourteenth Amendment rights were violated by the trial court's allowance of testimony by Paul Banales, a county attorney. The trial court overruled Lambright's objection, and allowed Banales to testify about the immunity agreement he entered into with Kathy Foreman. It was Banales who decided to offer immunity to Foreman. He was actively involved in the investigation and the subsequent preliminary hearing. After ***1572** the defendants called Foreman's credibility into question, the State called Banales. He testified that Foreman's story had not changed during the course of the investigation through the time she entered into the immunity agreement. Lambright contends that Banales was a prosecutor and therefore should not have been a witness. This, argues Lambright, denied him the right to a fair trial.

Lambright did raise this issue on direct appeal, but did not present it as a federal issue as required by *Duncan* and *Keeney*. [FN12] He did not alert the state court to the fact that he was asserting a claim under the United States Constitution. He first raised it as a federal issue in the second Rule 32 proceeding, where the state court held that it was precluded under Rule 32.2(a). He had defaulted on the claim by failing to raise it in the earlier Rule 32 proceeding. As such, Lambright has procedurally defaulted on trial claim 5 and presents no grounds sufficient to excuse this default.

> FN12. *See also Granberry v. Greer*, 481 U.S. 129, 136, 107 S.Ct. 1671, 1676, 95 L.Ed.2d 119 (1987) (state prisoner must apprise the state court of the legal theory and the facts upon which he bases his claim).

F. Proposed Jury Instruction (Claim 6)

Trial claim 6 involves a requested jury instruction which was denied by the trial court. Smith and Lambright sought an instruction (# 10) stating:

> There are two defendants. You must consider the evidence in the case as a whole. However, you must consider the charge against each defendant separately.
>
> You must not be prejudiced against one defendant because you determine that the State has proved it's case against another defendant.

In refusing this instruction, Judge Brown explained that the two cases had been severed, so the proposed instruction was not applicable. Each jury

was considering the evidence admitted only as to its respective defendant. He did instruct the jury on accomplice liability, and found that the accomplice instruction addressed the concerns raised.

Lambright maintains that this refusal is violative of the Sixth and Fourteenth Amendments because it created a danger of Lambright's jury finding him guilty based upon Smith's conduct. The State once again responds with the doctrine of procedural default.

This claim, while presented on direct appeal, was not presented as a federal issue as required by *Duncan* and *Keeney*. It is therefore precluded due to Lambright's unexcused procedural default. Further, for the reasons explained above regarding the constitutionality of dual juries, this claim lacks merit. Trial claim 6 is precluded and alternatively denied on the merits.

G. Death Qualified Jury (Claim 7)

Lambright argues in trial claim 7 that the death qualification of his jury denied his right to a fair trial and impartial jury. It is improper, Lambright asserts, for Arizona to exclude jurors who express reservations about capital punishment. This is because in Arizona, the jury determines only guilt--not the sentence. Hence, there is no need to death scruple a jury. Lambright complains that one venireperson was excused due to that person's objections to the death penalty.

This claim is precluded from federal review because Lambright procedurally defaulted the claim in state court. When he finally raised the issue in his second Rule 32 petition, the state court deemed it precluded under Rule 32.2(a)(3) due to the failure to raise it either on direct appeal or in the first Rule 32 petition. He presents no grounds sufficient to excuse the default.

Trial claim 7 also fails on the merits. The trial court, the state, and the accused should attempt to identify and dismiss those prospective jurors who will not be fair to either party. People with fundamental opposition to the death penalty may not be fair to the State and may properly be excluded from the guilt phase. *Lockhart v. McCree,* 476 U.S. 162, 170 n. 7, 172, 106 S.Ct. 1758, 1763 n. 7, 1764, 90 L.Ed.2d 137 (1986); ***1573** *Morgan v. Illinois,* 504 U.S. 719, 732-33, 112 S.Ct. 2222, 2231-32, 119 L.Ed.2d 492 (1992); *Arizona v. LaGrand,* 153 Ariz. 21, 33, 734 P.2d 563, 575,

cert. denied, 484 U.S. 872, 108 S.Ct. 207, 98 L.Ed.2d 158 (1987); *Arizona v. Fisher,* 141 Ariz. 227, 249, 686 P.2d 750, 772 (Ariz.), *cert. denied,* 469 U.S. 1066 (1984). Furthermore, the trial court's decision to excuse a juror because of death penalty attitudes is a finding of fact subject to a presumption of correctness. *Wainwright v. Witt,* 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985). There is no argument or indication in the record that this presumption should be overcome. Trial claim 7 is precluded, and alternatively, denied on the merits.

H. Inculpatory Statements (Claim 8)

Lambright next asserts that his statements made after his arrest were involuntary and should not have been admitted against him at trial. This issue was presented to the state supreme court and is appropriate for federal review on the merits.

Four officers were involved in the arrest of Lambright at his place of employment. One officer who was positioned about a quarter mile away at a grocery store, called the auto sale shop where Lambright was working, in order to detain him on the phone. Meanwhile, three other officers arrived at the auto shop to arrest him. The arresting officers did not display any guns during the arrest. One officer explained to Lambright his "*Miranda* rights," and another handcuffed him and placed him in the back of an unmarked police car. The group left the auto sales store with Lambright handcuffed in the back seat, along side one of the officers. They proceeded to the grocery store to pick up the fourth officer and then went to a restaurant where an officer's car had been left before the arrest. From there, Lambright and the four officers drove to the Orange County jail.

At the voluntariness hearing, Lambright testified that during the car ride, an officer in the back seat with him had a gun displayed on his lap, with the muzzle pointed toward Lambright. He stated that the officer commented on how that gun "can put big holes in a person." (R.T. at 421). The three officers in the car, refuted Lambright's testimony, all claiming that they saw no gun displayed during the car ride.

Lambright said that during the booking process, he was allowed two phone calls. He testified that, in the presence of officers, he called his sister and his boss, asking both to arrange for an attorney to come there immediately.

The officers testified that they could not specifically recall the phone calls and never heard Lambright mention a lawyer.

According to Lambright's voluntariness hearing testimony, after going through the booking process, one of the officers asked Lambright if he wanted to talk about the case and motioned for Lambright to come towards him into a room. The officer said that he had a statement from Kathy Foreman and Lambright said he would talk to him. Lambright testified that as they began to talk, the officer asked if Lambright had an attorney. Lambright responded that he had one coming, but the officer again asked if Lambright would talk with him. Although Lambright did not refuse to answer the officer's questions, he said that he thought he should talk to his attorney. The officer's testimony differed sharply, in that he denied hearing Lambright mention a lawyer.

Lambright further testified that he had been arrested before and knew that he had the right to have an attorney present and to not make statements to the police. He did not tell the officers that he would not talk to them and he was apprised of his rights. The officer continued to ask questions. The officer, who was a foot taller and probably a hundred pounds larger than Lambright, said that Foreman had given a statement and had tried unsuccessfully to help locate Owen's body. Lambright talked to the officer and made inculpatory statements about what happened in Arizona. He drew pictures of Foreman's knife and sketched a map of the area.

Lambright said that following this, the officer told him about a local case where a defendant avoided prison by helping the police locate a codefendant. The defendant who spoke first, got a favorable deal. If Lambright helped them find the body, he ***1574** would "probably get treated a lot lighter." (R.T. at 430). All the testifying officers contradicted Lambright's testimony regarding such a case. One officer did admit knowing of such a case, but said that it was not mentioned on that day.

During the time he was in the interview room, Lambright testified, four or five officers came in at different times. Four of them questioned him at different times throughout the morning. He was not in handcuffs and was given cigarettes, but was not allowed to leave the small room. The officers were seeking Lambright's waiver of extradition. Lambright said that he was told that "if I fought it, it would go harder on me because they would have to--to go through the process of getting the governor's warrant and come get me." (R.T. at 423). He was provided a pre-printed form, so that

he might write out a statement. An officer read to him the language at the top of the form, which again explained his rights to silence and to an attorney. He indicated that he understood and signed that he was making a knowing, voluntary waiver of those rights.

As Lambright began to write out the statement, he was informed that a judge had arrived. It was about 12:10 p.m., roughly two and a half hours after his arrest. The judge read to Lambright the statute regarding extradition. When Lambright asked the judge a question about extradition, the judge explained that he was not there to give legal advice as an attorney. The judge suggested that Lambright should have an attorney and said that he would appoint one. The judge got a lawyer on the phone, with whom Lambright spoke. The lawyer told him to say nothing further. Lambright told the officers that his lawyer had instructed him not to say anything and not to sign anything. Lambright was placed in a cell, isolated from other prisoners. He claimed that he was not allowed visitors, cigarettes or reading material.

Lambright testified that about six or seven hours later that afternoon, two of the officers came to his cell and initiated a conversation with Lambright. They asked if he had anything to say about the case and if he was going to sign the extradition papers. Lambright said no, he did not want to say anything more.

During his stay at the Orange County jail, Lambright said that officers came to his cell three more times. Again, they attempted to talk with Lambright. On one of those visits to the cell, according to Lambright, one of the officers hit the wall and said that Lambright was wrong for trying to protect someone, that Lambright was harming himself and doing an injustice. Lambright did not say anything.

A few days later, a Pima County Sheriff's Department detective came to escort Lambright to Tucson. The detective told Lambright that he would not talk to him about the case because Lambright was represented by counsel. Despite the detective's unwillingness to talk to Lambright, Lambright did make inculpatory statements.

The trial court found that Lambright's statements made at the Orange County jail before the judge arrived were made voluntarily, without coercion, promise of benefit, force or duress. The statements made after the judge's 12:10 p.m. arrival however, were suppressed. The statements

made to the detective on the trip to and upon arrival in Arizona were allowed.

Lambright argues that the judge erred in finding that the statements were voluntary. The officer's knowledge of a local case where a defendant was given easier treatment, Lambright contends, makes clear that Lambright's version of events was not fabricated. He claims that pointing the gun in the car and offering lighter treatment constitutes coercion that overcame Lambright's free will. He also argues that his right to counsel was violated by the officers' continued questioning after he had made calls to find an attorney. And finally, Lambright asserts that the statements made to the detective enroute to Arizona were the product of earlier misconduct. This Court does not agree.

It is apparent to this Court that Judge Brown resolved the conflicting testimony of Lambright and the officers in favor of the officers. In a federal habeas proceeding, state findings of fact that involve contradictory testimony are conclusive "if fairly ***1575** supported by the record." *Miller v. Fenton,* 474 U.S. 104, 117, 106 S.Ct. 445, 453, 88 L.Ed.2d 405 (1985); *Wright v. West,* 505 U.S. 277, 112 S.Ct. 2482, 120 L.Ed.2d 225 (1992); *Jackson v. Virginia,* 443 U.S. 307, 326, 99 S.Ct. 2781, 2792-93, 61 L.Ed.2d 560 (1979); *McMillan v. Gomez,* 19 F.3d 465, 469 (9th Cir.1994), *cert. denied,* 513 U.S. 860, 115 S.Ct. 170, 130 L.Ed.2d 107 (1994). Essentially, Judge Brown had to determine who was lying. He had the advantage that this Court lacks in that he observed the demeanor in order to evaluate the credibility of all the witnesses at the voluntariness hearing. When making credibility determinations, a cold record transcript is no substitute for first-hand observation. A federal habeas court cannot substitute its judgment for that of the state court on the credibility of witnesses who appeared before the state court. *Marshall v. Lonberger,* 459 U.S. 422, 103 S.Ct. 843, 74 L.Ed.2d 646 (1983).

This Court affords great weight to the conclusions of the coequal state judiciary. *Miller v. Fenton,* 474 U.S. 104, 112, 106 S.Ct. 445, 450-51, 88 L.Ed.2d 405 (1985); *Greenawalt v. Ricketts,* 943 F.2d 1020, 1027 (9th Cir.1991), *cert. denied,* 506 U.S. 888, 113 S.Ct. 252, 121 L.Ed.2d 184 (1992). Historical or subsidiary facts pertaining to the voluntariness of a confession is entitled to the presumption of correctness. *Miller,* 474 U.S. at 112, 106 S.Ct. at 450-51; *Collazo v. Estelle,* 940 F.2d 411, 415 (9th Cir.1991), *cert. denied,* 502 U.S. 1031, 112 S.Ct. 870, 116 L.Ed.2d 776 (1992).

This Court determines that not only are Judge Brown's findings supported by the record, his conclusions are also correct. Four different witnesses, from three different law enforcement agencies, testified consistently. All denied the display of a weapon in the car and all denied saying or hearing anything that day about a case where the first confessing defendant was given a light sentence.

This Court does not find it significant that one of the officers did admit that such a case had occurred in that area and that he knew about it. Lambright could have heard of the case in a variety of ways or could have guessed such a case would have existed due to his vagueness in describing the facts surrounding the case. In any event, Judge Brown considered the live testimony of four officers whose versions were independently consistent, even though they were with Lambright at differing times. Two of these witnesses were from Orange County, one was from the Texas Department of Public Safety, and the last was from the Louisiana State Police. There is nothing in the record to corroborate Lambright's allegation that an officer pointed a gun at him during the car ride to the police station. Its self-serving nature is obvious.

This is not intended to suggest that numerosity necessarily equals veracity. Rather it is respect for the trial court's findings due to the unique position of live observation. This Court declines the invitation to second guess the trial court's resolution of conflicting testimony because the findings are reasonable and are supported by the record. The trial court's findings that the statements made prior to 12:10 p.m. were voluntary comports with the United States Constitution.

There was also no constitutional violation in the officer's attempts to question Lambright after he purportedly called his sister and boss to try to obtain a lawyer. This too, was refuted by the other officers. All testified that they did not hear Lambright ask anyone about a lawyer. Again, the trial court's findings are supported and reasonable. Furthermore, even if it is true that Lambright made two calls in the presence of officers in which he asked for a lawyer, this is not tantamount to an unequivocal request for counsel. Lambright did not testify that any of the officers overheard his telephone conversations. Although he testified that he knew he had the right to not answer questions and to have a lawyer present, he nonetheless openly made damaging statements.

Finally, because there was no prior misconduct, Lambright's spontaneous statement to the detective enroute to and upon arrival in Tucson could not have been the product of previous misconduct. As with his statements in Orange County, there is sufficient evidence to support the conclusion that they ***1576** were freely, knowingly made. Trial claim 8 is denied on the merits.

I. Possibility of Non-Unanimous Verdict (Claim 9)

Lambright complains in trial claim 9 that the form of the verdict made it impossible to determine whether or not the jury's decision was unanimous. The judge instructed the jury on premeditated murder and felony murder. But the verdict form only indicated that Lambright was guilty of murder in the first degree.

The Rule 32 court found this claim precluded due to Lambright's failure to raise it on direct appeal. It is, therefore also precluded from federal review. The Petitioner has not demonstrated cause and prejudice to excuse the procedural default. Additionally, this claim is meritless in light of *Schad v. Arizona*, 501 U.S. 624, 111 S.Ct. 2491, 115 L.Ed.2d 555 (1991) (no separate verdicts required for felony murder and probation). Trial claim 9 is precluded and is alternatively denied on the merits.

J. Voir Dire Questions as Part of the Record (Claim 10)

The trial court utilized a juror questionnaire, designed to reveal any potential juror bias in a case where the death penalty could be imposed. Judge Brown showed the questionnaire to the attorneys and allowed them to comment upon it. They were afforded the opportunity to recommend additional questions. The court distributed the questionnaire to the entire jury pool and asked them to complete it in the courtroom. The forms were collected from the pool and again made available to the attorneys. Judge Brown referred to the questionnaire during voir dire In instances where jurors had expressed a strong opinion about the death penalty, the judge questioned them further. Both defendants affirmatively stated no objection to the use of the forms and neither requested that they be made part of the record. Yet now, Lambright complains that failure to include the forms in the record denied him meaningful appellate review.

Once again, the Petitioner has procedurally defaulted on the claim. The Rule 32 court ruled the claim waived and barred for failure to object or

raise on direct appeal. As such, his unexcused procedural default precludes federal review. Moreover, Lambright has never requested the record be supplemented to include the forms. Trial claim 10 is denied.

III. SENTENCING CLAIMS (Claims 1-16)

A. Preclusion of the Death Penalty When There is Only One Aggravating Factor (Claim 1)

Lambright's first sentencing claim submits that where there is only one aggravating factor and significant mitigating evidence, life must be imposed over death. He cites *Arizona v. Rockwell,* 161 Ariz. 5, 775 P.2d 1069 (1989) (en banc) and *Arizona v. Marlow,* 163 Ariz. 65, 786 P.2d 395 (1989) (en banc), which reemphasized that where doubt exists, the death penalty should not be imposed. If there is significant mitigating evidence and little aggravating evidence, there is doubt.

The State responds that the claim is precluded because it was not raised until the second Rule 32 proceeding. The Rule 32 court rejected the claim but did not expressly state that it relied on state law in denying the claim. The supreme court denied review. Lambright has, therefore fairly presented this claim to the State's highest court.

The State also contends that *Rockwell* and *Marlow* are not applicable under *Teague v. Lane,* 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), because they involve new rules announced after Lambright's conviction became final. The Court disagrees with the State but also disagrees with Lambright. These cases neither involve new rules, nor institute a per se life sentence where there is only one aggravating factor.

Rockwell and *Marlow* do not represent new constitutional rules under *Teague* because they restate the Arizona Supreme Court's determination to comply with federal constitutional precedent mandating that arbitrary death sentence risks be minimized. *See Saffle v. Parks,* 494 U.S. 484, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990) (indicating that ***1577** a case in which the result was dictated by existing precedent does not announce a new rule). [FN13] More importantly, those two cases do not command reversal of death sentences where there is one aggravating factor and more than one piece of mitigating evidence. They simply reaffirm the importance of weighing aggravating factors and mitigating factors in an individual case to reduce the chance of arbitrary or capricious sentencing. *See Goeke v.*

Branch, 514 U.S. 115, ----, 115 S.Ct. 1275, 1277, 131 L.Ed.2d 152 (1995) (reiterating that a case announces a new rule if the result was not dictated by existing precedent at the time the conviction becomes final). As such, even if *Rockwell* and *Marlow,* did create a new rule, which this Court does not see, the supposed new rule is not the one that the Petitioner seeks to apply.

> FN13. The Tenth Circuit has ruled that a challenge to the definition of especially heinous aggravating factor did not involve creation of a new rule. *Davis v. Maynard,* 911 F.2d 415, 416-18 (10th Cir.1990).

In *Rockwell,* the Arizona Supreme Court independently weighed the evidence and reduced a death sentence to life imprisonment. The court was faced with one statutory aggravating factor and "significant mitigating evidence." 161 Ariz. at 16, 775 P.2d at 1080. It discussed several circumstances that when weighed against the one aggravating factor, showed that death should not be imposed. Rockwell presented mitigating evidence regarding his age, alcohol abuse, physical disability that affected him psychologically, and his destructively competitive relationship with his brother. Balancing all this mitigating evidence against the one aggravating factor, the court found doubt. When there is doubt, it must be resolved in favor of life.

What the state supreme court was doing, is what it has long done, independently weighing the relevant factors. [FN14] It did not establish or even discuss a per se rule when only one aggravating factor was proven. It continued to perform an individual balancing of the proven factors.

> FN14. *See Arizona v. Milke,* 177 Ariz. 118, 128, 865 P.2d 779, 789 (1993) (en banc) (Arizona Supreme Court has responsibility of independently reviewing aggravating and mitigating circumstances to determine whether the death penalty was properly imposed), *cert. denied,* 512 U.S. 1227, 114 S.Ct. 2726, 129 L.Ed.2d 849 (1994); *Arizona v. Watson,* 129 Ariz. 60, 63, 628 P.2d 943, 946 (1981) (en banc) (death penalty cases require the supreme court's separate and independent judgment in deciding whether or not death appropriately imposed).

Marlow also involved "substantial" mitigating evidence not considered by the trial court. The doubt that *Rockwell* and *Marlow* addressed was where

a single aggravating circumstance was countered by significant mitigating evidence.

There is no doubt in the present case because there is no "substantial" or "significant" mitigating evidence. Lambright and his accomplices took this young, emotionally unstable woman to a desolate, far away place. She had been sexually assaulted on the way and asked her captors if they would let her go. She was trembling and tried to calm her nerves. She was sexually assaulted again after they took her to the remote mountainous area. Lambright twisted and wrenched the knife around inside her. He stabbed her multiple times and attempted to sever her neck. As she struggled helplessly to raise up on one elbow, Lambright came back and bashed her in the head with a rock, saying "Die, bitch." He took her jewelry and then listened to "We are the Champions" as they drove away, leaving Owen dead. He even wore her necklace for a year after the murder, as a "memento" of the trip. Without doubt, this establishes that the killing was committed in an "especially heinous, cruel, or depraved manner" as set forth in A.R.S. § 13-703(F)(6).

Lambright presented his lack of violent criminal history, honorable military discharge, alleged unsettled childhood and the immunity given Foreman. The supreme court independently reviewed all the mitigating evidence and balanced it against the established heinous and depraved aggravating factor. It exercised its independent judgment and looked at the evidence separately, just as it did in *Rockwell, Marlow* and countless other cases. The court has repeatedly found that the death penalty was an appropriate sentence where heinous cruel or depraved ***1578** manner was the only aggravating factor established. *See, e.g., Jeffers; State v. Knapp,* 114 Ariz. 531, 562 P.2d 704 (1977), *cert. denied,* 435 U.S. 908, 98 S.Ct. 1458, 55 L.Ed.2d 500 (1978). This Court agrees with the supreme court that Lambright's evidence of mitigation is not "sufficiently substantial to outweigh the aggravating circumstance and to call for leniency." Sentencing claim 1 is denied on the merits.

B. The Application of A.R.S. § 13-703(F)(6) (Claim 2)

Lambright asserts in sentencing claim 2 that the supreme court has failed to adhere to a single limiting construction of the especially heinous, cruel and depraved manner factor. The thrust of Lambright's claim is that § 13-703(F)(6) is vague and the court has failed to cure the vagueness by providing adequate guidance to the sentencer. This, says Lambright,

violates the Eighth and Fourteenth Amendments to the United States Constitution.

The United States Supreme Court considered this argument in *Walton v. Arizona*, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990), and determined that A.R.S. § 13-703(F)(6) does not violate the Eighth and Fourteenth Amendments. Specifically, the Court held that while the statutory factor is facially vague, the state supreme court had provided guidance to the sentencer. "[W]e find that its construction meets constitutional requirements." *Id.* at 654, 110 S.Ct. at 3057. *See also Arizona v. West*, 176 Ariz. 432, 454, 862 P.2d 192, 214 (1993) (en banc) (Arizona has adequately guided the discretion of the sentencer), *cert. denied*, 511 U.S. 1063, 114 S.Ct. 1635, 128 L.Ed.2d 358 (1994).

This would seem to end the matter. However, Lambright protests that the state supreme court should be required to list the factors necessary for an (F)(6) finding. He argues that the supreme court did set out factors in *Arizona v. Gretzler*, 135 Ariz. 42, 51, 659 P.2d 1, 10 (en banc), *cert. denied*, 461 U.S. 971, 103 S.Ct. 2444, 77 L.Ed.2d 1327 (1983), but did not limit the sentencing court to those enumerated factors. Rather, Lambright cites several cases to assert that the court continues to recognize more factors to support an (F)(6) finding.

Lambright's argument is not persuasive. These cited cases were decided prior to *Walton*. The United States Supreme Court had the benefit of those cases in reaching its decision that § 13-703(F)(6) is constitutional.

This case contains the factors discussed in *Gretzler*. First, Lambright relished in the killing. He twisted the knife around inside Sandy and even later commented on how her head bounced when he smashed the rock into it. He celebrated afterward in the car with Foreman and Smith. Further, he was still wearing Sandy's jewelry when he was arrested.

Second, he inflicted gratuitous violence upon Ms. Owen. After Lambright repeatedly stabbed her and tried to cut through her neck, and after Smith attempted to break her neck, Lambright bashed the dying girl in the head with a rock. At this time she was conscious and in obvious great pain. She was struggling to get up. Third, the crime was also senseless. The kidnapping and rape were serious enough, but the three could have left her alive.

Finally, Owen was certainly a helpless victim. Her perpetrators knew that she had just been released from a mental health treatment program and was on medication. She was a young woman trapped in a car with three people who could no doubt overpower her. She was taken to a remote area a distance away from the freeway. There was no one to come to her rescue. She had already been assaulted in the car and expressed fears about her fate. She was rendered even more helpless once Smith began to choke her. She fell to the ground, at which point she found herself being stabbed in the chest. Alone and injured, she tried to lift herself up on one arm. She could not have been more vulnerable.

The application of the factor and the construction given the factor comport with *Gretzler* and *Walton*. Arizona's construction of [the] "especially heinous" factor is constitutional. *Lewis v. Jeffers*, 497 U.S. 764, 110 S.Ct. 3092, 111 L.Ed.2d 606 (1990). Further, while a federal court may consider ***1579** state court formulations of a limiting construction, it may not review state court cases to determine whether a limiting construction has been applied consistently. *Arave v. Creech*, 507 U.S. 463, 113 S.Ct. 1534, 123 L.Ed.2d 188 (1993). [FN15] The task for the federal court is to determine whether the state's reliance on the aggravating factor is so arbitrary and capricious as to constitute an independent due process or Eighth Amendment violation. *Richmond v. Lewis*, 506 U.S. 40, 50, 113 S.Ct. 528, 536, 121 L.Ed.2d 411 (1992). Evidence supporting the finding of an aggravating circumstance is sufficient if, viewing the evidence in the light most favorable to the state, any rational trier of fact could find guilt beyond a reasonable doubt. *Jeffries v. Blodgett*, 5 F.3d 1180, 1193 (9th Cir.1993), *cert. denied*, 510 U.S. 1191, 114 S.Ct. 1294, 127 L.Ed.2d 647 (1994).

FN15. A federal habeas court reviews a state court's application of a narrowing construction of an aggravating circumstance under the rational factfinder standard of *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). *Richmond v. Lewis*, 506 U.S. 40, 47, 113 S.Ct. 528, 534, 121 L.Ed.2d 411 (1992). A federal court will not review a state court's interpretation of a statute unless the interpretation is so untenable that it amounts to subterfuge to avoid federal review. *Knapp v. Cardwell*, 667 F.2d 1253, 1260 (9th Cir.), *cert. denied*, 459 U.S. 1055, 103 S.Ct. 473, 74 L.Ed.2d 621 (1982).

There is sufficient evidence to support a finding that the killing was committed in a heinous, cruel and depraved manner. There is no basis for Lambright's claim that the state supreme court did not adopt and apply a sufficiently narrowed construction of the factor. Sentencing claim 2 is denied on the merits.

C. Consideration of Proffered Mitigating Evidence (Claim 3)

In claim 3, Lambright asserts that Judge Brown failed to individually and cumulatively weigh all the mitigating evidence proffered. Lambright points out that the sentencer rejected the lack of prior violent criminal record. Instead of considering this in mitigation, the judge commented that his lack of a record was more likely the result of not being caught. He did not even mention certain other mitigating factors presented and failed to give cumulative weight to mitigating factors. This, Lambright claims, violates the Eighth and Fourteenth Amendments.

Determining a death sentence demands individualized consideration of mitigating circumstances. All relevant mitigating evidence must be admitted and considered by the sentencer. *Lockett v. Ohio,* 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); *Eddings v. Oklahoma,* 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). A federal habeas petitioner is entitled to relief if the federal court can discern from the record that all mitigating evidence was not considered. *Parker v. Dugger,* 498 U.S. 308, 111 S.Ct. 731, 112 L.Ed.2d 812 (1991).

Any error at the trial court was cured on direct appeal. The Arizona Supreme Court conducted an independent review of the aggravating and mitigating factors and determined for itself that a death sentence was appropriate. The court specifically stated that it considered "all the mitigation by the defendant" and found that it did not "outweigh the aggravating circumstance and to call for leniency." *Lambright,* 138 Ariz. at 69, 673 P.2d at 14.

A court's statement that it did consider all evidence in determining whether any mitigating factors existed shows that the mitigating evidence was considered. *Jeffers v. Lewis,* 38 F.3d 411, 414 (9th Cir.1994), *cert. denied,* 514 U.S. 1071, 115 S.Ct. 1709, 131 L.Ed.2d 570 (1995). [FN16] A court is deemed to have taken into account all mitigating evidence where the court so states. *Parker v. Dugger,* 498 U.S. 308, 314-15, 111 S.Ct. 731, 735-36, 112 L.Ed.2d 812 (1991). An appellate court can cure

constitutional sentencing errors by reweighing the evidence and determining the propriety of death. *Clemons v.* ***1580** *Mississippi*, 494 U.S. 738, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990). [FN17]

> FN16. For the purposes of federal habeas review, where the defendant had a full opportunity at a hearing to present all mitigating evidence, the weight given to any one factor is within the trial court's discretion. *Palmes v. Wainwright*, 725 F.2d 1511, 1523 (11th Cir.), *cert. denied*, 469 U.S. 873, 105 S.Ct. 227, 83 L.Ed.2d 156 (1984).
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> FN17. Standards for balancing significance of aggravating and mitigating circumstances are not required where appellate review is available. *Zant v. Stephens*, 462 U.S. 862, 879-80, 103 S.Ct. 2733, 2744, 77 L.Ed.2d 235 (1983).

The state supreme court's statement is determinative. It independently considered all mitigating circumstances and thereby cured any shortcoming that occurred at sentencing. The Petitioner is not entitled to relief on claim 3.

D. Supreme Court's Reweighing (Claim 4)

Lambright next contends that the state supreme court did not adequately reweigh the aggravating and mitigating evidence. He complains that the court considered some, but not all of the proffered mitigating evidence.

As shown above, the court did consider all the mitigation evidence Lambright offered. It need not specifically address each suggestion of mitigation in its written opinion. Rather, the court properly stated that it considered everything Lambright suggested, and came to an independent conclusion. No constitutional error occurred so sentencing claim 4 must be denied on the merits.

E. Nonstatutory Aggravating Factors (Claim 5)

Sentencing claim 5 maintains that Arizona imposed the death penalty based upon numerous nonstatutory aggravating factors. This claim was raised for the first time in the Rule 32 petition. The Rule 32 court denied the claim as precluded and meritless. Lambright has not shown cause and prejudice

to overcome this procedural default. Thus, this claim is precluded from federal review.

Not only is the claim precluded due to procedural default, it is meritless. The trial judge repeatedly stated on the record that he did not consider any nonstatutory factors. Moreover, the supreme court's independent review considered only the "especially heinous" aggravating factor. Sentencing claim 5 is precluded and alternatively, is denied on the merits.

F. Finding of Intent to Kill (Claim 6)

Lambright claims that the trial court's finding that Lambright intended to kill Owen violated *Enmund v. Florida,* 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982) [FN18] because the finding was based on the unreliable statements of Foreman and Smith. Both were active participants in the crime and there was no opportunity to cross examine Smith about his statements.

> FN18. The Eighth Amendment prohibits the execution of a person "who neither took life, attempted to take life, nor intended to take life." *Enmund,* 458 U.S. at 787-88, 102 S.Ct. at 3371. However, a defendant who played a significant role in a felony that resulted in murder and who acted with reckless indifference to human life may properly be sentenced to death. *Tison v. Arizona,* 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987). *See also Greenawalt v. Ricketts,* 943 F.2d 1020 (9th Cir.1991) (*Enmund* satisfied where trial court found that defendant knowingly created a grave risk of death and supreme court found that defendant was an active participant in the felonies committed), *cert. denied,* 506 U.S. 888, 113 S.Ct. 252, 121 L.Ed.2d 184 (1992).

In considering Lambright's and Smith's post conviction petitions, the trial court stated that it had not relied on the statements of the co-defendants against the other. That is, the court did not rely on Smith's statement in sentencing Lambright, and vice versa. There is, therefore no error.

It is true that Foreman was an active participant in Owen's killing and her motivation to lie was strong. Lambright and Smith cross- examined Foreman thoroughly. Much of her testimony was consistent with Lambright's own statements. The trial court's *Enmund* finding that Lambright intended to kill is entitled to a presumption of correctness. 28

U.S.C. § 2254(d); *Miller v. Fenton*, 474 U.S. 104, 105, 106 S.Ct. 445, 447, 88 L.Ed.2d 405 (1985); *Demosthenes v. Baal*, 495 U.S. 731, 110 S.Ct. 2223, 2225, 109 L.Ed.2d 762 (1990); *Coley v. Gonzales*, 3 F.3d 1385, 1387 (9th Cir.1995); *Palmer v. Estelle*, 985 F.2d 456, 458 (9th Cir.), *cert. denied*, 509 U.S. 928, 113 S.Ct. 3051, 125 ***1581** L.Ed.2d 735 (1993); *Paradis v. Arave*, 20 F.3d 950, 959 (9th Cir.1994), *cert. denied*, 513 U.S. 1117, 115 S.Ct. 915, 130 L.Ed.2d 796 (1995). It is well supported by the record. Sufficient evidence of Lambright's intent to participate in the murder was presented and the jury was instructed on both premeditation and felony murder, so the trial court need not specifically make an *Enmund* finding of intent. *Richmond v. Lewis*, 948 F.2d 1473 (9th Cir.), *rev'd on other grounds*, 506 U.S. 40, 113 S.Ct. 528, 121 L.Ed.2d 411 (1992). While this Court, like the trial and appellate courts, is appalled that Foreman received complete immunity, that does not detract from the trial court's considered factual determination. Sentencing claim 6 is denied on the merits.

G. Victim Statements (Claim 7)

Lambright contends in sentencing claim 7 that the trial court improperly relied upon the statements of Sandy's mother in imposing the death sentence. The presentence report indicated that the mother thought Lambright should die. Lambright submits that this violated the Eighth and Fourteenth Amendments.

This claim is precluded. When it was first raised in the second Rule 32 petition, the state court denied it because it was not presented on direct appeal. There is no cause and prejudice to excuse this procedural default. Sentencing claim 7 is barred from federal review.

Even if this claim were not precluded, it would be denied on the merits. Judges are presumed to only consider relevant information in imposing capital sentences. *Jeffers*, 38 F.3d at 415. The court stated that it had not relied upon any victim statements in sentencing Lambright to death. There is no indication in the record to conclude otherwise. Further, there is no per se prohibition on the use of victim impact evidence. *Payne v. Tennessee*, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991). Lambright has presented nothing to overcome the presumption that the judge did not rely upon the mother's statements and has not shown how the alleged reliance violated any rights secured by the Constitution. Sentencing claim 7 is precluded and is alternatively denied on the merits.

H. The Presentence Report (Claim 8)

In sentencing claim 8, Lambright asserts that the trial court relied on uncorroborated, prejudicial, hearsay statements contained in the presentence report in imposing the death sentence. He complains that the court's use of this information denied him the right to confront and rebut the statements. This, he says, violated the Sixth, Eighth and Fourteenth Amendments.

Once again Lambright has procedurally defaulted on the claim. When the issue was first raised in the state court, that court ruled it precluded for failure to contemporaneously object and for failure to raise it on direct appeal. Lambright has not demonstrated cause and prejudice to excuse the default, so the claim is precluded from federal review.

Further, this Court agrees with the State that in any event, the supreme court's de novo review cured any deficiency during sentencing. The supreme court did not rely on the presentence report and made an independent determination that the death penalty was the proper sentence. [FN19] Sentencing claim 8 is precluded and is alternatively denied on the merits.

> FN19. No constitutional violation results from a judge having a presentence report before him at sentencing where the findings made are based on evidence adduced at trial. *Clark v. Ricketts*, 958 F.2d 851 (9th Cir.1991), *cert. denied*, 506 U.S. 838, 113 S.Ct. 117, 121 L.Ed.2d 73 (1992).

I. The Determination of Aggravating Factors (Claim 9)

The Petitioner contends that A.R.S. § 13-703 is unconstitutional because it directs the court, rather than the jury, to determine the existence of aggravating factors. He recognizes that *Walton v. Arizona*, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990) rejected this claim and held that the Arizona sentencing scheme in which the judge alone determines aggravating and mitigating circumstances does not violate the ***1582** Sixth Amendment. [FN20] There is no right to a jury determination of aggravating factors. Sentencing claim 9 is denied on the merits.

> FN20. The Ninth Circuit has also rejected constitutional challenges to Arizona's judge-only sentencing statute in *Carriger v. Lewis*, 971 F.2d 329 (9th Cir.1992), *cert. denied*, 507 U.S. 992, 113 S.Ct.

1600, 123 L.Ed.2d 163 (1993); *Clark v. Ricketts*, 958 F.2d 851(9th Cir.1991), *cert. denied*, 506 U.S. 838, 113 S.Ct. 117, 121 L.Ed.2d 73 (1992); *Richmond v. Lewis*, 948 F.2d 1473 (9th Cir.1992), *rev'd on other grounds*, 506 U.S. 40, 113 S.Ct. 528, 121 L.Ed.2d 411 (1992).

J. The Defendant's Burden of Proof (Claim 10)

A.R.S. § 13-703 requires the defendant to prove, by a preponderance of the evidence, mitigating factors sufficiently substantial to call for leniency. Lambright argues that this burden placed on the defendant violates the Constitution. He does, however, again recognize that the United States Supreme Court rejected this argument in *Walton*. Referring to Justice Blackmun's dissent, he asks this Court to ignore *Walton*. The Court declines to do so and finds that this claim is foreclosed by *Walton*. Sentencing claim 10 is denied on the merits.

K. Presumption of Death (Claim 11)

Lambright submits that § 13-703 unconstitutionally creates a presumption of death that the defendant must overcome by proof of substantial mitigating factors that call for leniency. This claim too was considered and rejected in *Walton*. Based upon *Walton*, sentencing claim 11 is denied on the merits.

L. Lack of Prosecutorial Guidance (Claim 12)

In sentencing claim 12, Lambright asserts that § 13-703 contains no directions or guidelines to reduce the risk of a prosecutor arbitrarily and capriciously deciding to seek the death penalty. He cites to an Illinois district court case that he acknowledges was overruled by the Seventh Circuit. The Seventh Circuit recognized that the decision to seek the death penalty is made by a separate branch of the government and is therefore not a cognizable federal issue. *Silagy v. Peters*, 905 F.2d 986, 993-94 (7th Cir.1990), *cert. denied*, 498 U.S. 1110, 111 S.Ct. 1024, 112 L.Ed.2d 1106 (1991), *and reversing in part* 713 F.Supp. 1246 (C.D.Ill.1989). This Court agrees and denies sentencing claim 12 on the merits.

M. Discriminatory Imposition of the Death Penalty (Claim 13)

Lambright contends that the death penalty is disproportionately imposed upon poor men convicted of killing a Caucasian. This, he says, is discrimination in violation of the Eighth and Fourteenth Amendments. The Petitioner relies upon the dissent in *McCleskey v. Kemp*, 481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987) in asking this Court to grant relief.

It is the opinion of the United States Supreme Court, not the dissent, upon which this Court must rely. *McCleskey* requires proof of purposeful discrimination. 481 U.S. at 292-93, 107 S.Ct. at 1767. An offering of statistical evidence is not enough. *Harris v. Pulley*, 885 F.2d 1354 (9th Cir.1988), *cert. denied*, 493 U.S. 1051, 110 S.Ct. 854, 107 L.Ed.2d 848 (1990). There are no indicia of purposeful discrimination in this record. Also, the supreme court conducted a proportionality review and found that Lambright's sentence was proportional to the sentence imposed upon persons who committed similar crimes. Where, as here, the state courts have acted pursuant to a properly drawn statute and there is adequate guidance of discretion, the federal courts will not engage in a factual case-by-case comparison to review consistency. *Ford v. Strickland*, 696 F.2d 804, 819 (11th Cir.) (en banc), *cert. denied*, 464 U.S. 865, 104 S.Ct. 201, 78 L.Ed.2d 176 (1983). There is simply no evidence in this case that would even suggest purposeful discrimination. Sentencing claim 13 is denied on the merits.

N. Judge Determination of the Sentence (Claim 14)

Lambright claims that A.R.S. § 13-703 unconstitutionally requires the court, rather than the jury, to determine if the death penalty is the appropriate sentence. ***1583** As stated above, there is no right to a jury determination of the sentence in a capital case. The constitution does not mandate that a death sentence be imposed by a jury. *Walton v. Arizona*, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990). A state may distribute sentencing power as it wishes. *Spaziano v. Florida*, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984). Sentencing claim 14 is denied on the merits.

O. Notice of Aggravating Factors (Claim 15)

Lambright claims that he did not receive adequate notice of the aggravating circumstances that the prosecution and the court relied upon in sentencing him to death. He does not, however, provide any basis for his claim. As explained above, only one aggravating factor was relied upon and it was

mentioned in the prosecutor's pre-hearing aggravation memorandum filed with the court. Lambright received adequate notice under *Goldberg v. Kelly*, 397 U.S. 254, 267-68, 90 S.Ct. 1011, 1020-21, 25 L.Ed.2d 287 (1970). Even if the sentencing court had relied upon previously unarticulated aggravating factors, the supreme court in its independent review did not. Any error at sentencing was cured on direct appeal.

Not only is this claim without merit, it is also precluded from federal review due to unexcused procedural default. The Rule 32 court held this claim precluded for failure to raise it on direct appeal. Lambright has not shown cause and prejudice to overcome this default. As such, sentencing claim 15 is precluded and is alternatively denied on the merits.

P. Methods of Execution (Claim 16)

In his final claim, Lambright asserts that death by lethal gas or by lethal injection is cruel and unusual punishment violative of the Eighth and Fourteenth Amendments. He describes in detail what he considers to be the long, painful death that results from the use of lethal gas and suggests that this method no longer comports with modern society's notions of decency.

Section 13-704(B) allows Lambright to elect the method of his execution. A statute that allows the condemned to choose between methods is not cruel and unusual. *Campbell v. Blodgett*, 978 F.2d 1502, 1517-18 (9th Cir.1992), *cert. denied*, 511 U.S. 1118, 114 S.Ct. 2125, 128 L.Ed.2d 682 (1994). By choosing injection over gas, Lambright has the power to render the lethal gas objection moot. *See id.* at 1518 ("By exercising his right to choose lethal injection, Campbell has a means to moot his constitutional objection ... [and] to make his problem disappear."). Lambright's claim regarding lethal gas does not require judicial intervention.

If Lambright's lethal gas claim were justiciable, this Court likely would, in light of *Fierro v. Gomez*, 77 F.3d 301 (9th Cir.1996), [FN21] agree that execution by lethal gas violates the Eighth Amendment's prohibition of cruel and unusual punishments. In *Fierro*, a 42 U.S.C. § 1983 case, the Ninth Circuit recently declared California's protocol for lethal gas executions unconstitutional. Lambright's concerns about this method of execution are well taken.

FN21. *Cf. Gray v. Lucas*, 710 F.2d 1048 (5th Cir.) (declining to find sufficient evidence to determine that lethal gas method of execution constitutes cruel and unusual punishment), *cert. denied*, 463 U.S. 1237, 104 S.Ct. 211, 77 L.Ed.2d 1453 (1983); *Hunt v. Nuth*, 57 F.3d 1327 (4th Cir.1995) (refusing to conclude that lethal gas execution is unconstitutional), *cert. denied*, 516 U.S. 1054, 116S.Ct. 724, 133 L.Ed.2d 676 (1996).

Nonetheless, Arizona has provided Lambright with the less controversial option of lethal injection. Therefore, the Court is called upon to decide whether execution by lethal injection is cruel and unusual.

The Eighth Amendment proscribes "punishments which are incompatible with 'the evolving standards of decency that mark the progress of a maturing society.'" *Estelle v. Gamble*, 429 U.S. 97, 102, 97 S.Ct. 285, 290, 50 L.Ed.2d 251 (1976) (quoting *Trop v. Dulles*, 356 U.S. 86, 101, 78 S.Ct. 590, 598, 2 L.Ed.2d 630 (1958)). Punishments are incompatibly cruel if they involve "torture or a lingering death," *In re Kemmler*, 136 U.S. 436, 447, 10 S.Ct. 930, 933, 34 L.Ed. 519 (1890), or "involve the unnecessary and wanton ***1584** infliction of pain." *Gregg v. Georgia*, 428 U.S. 153, 173, 96 S.Ct. 2909, 2925, 49 L.Ed.2d 859 (1976). The determination of whether a punishment violates these principles "should be informed by objective factors to the maximum possible extent." *Coker v. Georgia*, 433 U.S. 584, 592, 97 S.Ct. 2861, 2866, 53 L.Ed.2d 982 (1977). One of the most important objective factors is the contemporary emerging legislative trends throughout the nation. *Enmund v. Florida*, 458 U.S. 782, 788-90, 102 S.Ct. 3368, 3371-73, 73 L.Ed.2d 1140 (1982).

The Petitioner asks this Court to treat lethal injection just like lethal gas. He relies on a newspaper reporter's account of a lethal injection execution witnessed in Arizona. Lambright says that the reporter described that thirty seconds after the first of the three drugs was administered, the condemned man's neck jerked sharply. He stared at the ceiling and his chest heaved, then he was motionless. Presumably, this account was published in the *Arizona Daily Star*. [FN22] Although perhaps not well supported, this Court accepts Lambright's conveyance of the reporter's account as true.

FN22. The Petitioner neither cites the article, nor provides an affidavit from the reporter.

Accepting it as true that lethal injection results in a sharp jerk and noticeable breathing, followed by motionlessness, the Court finds that the Petitioner has not met his burden of showing that this method involves torture, lingering death, unnecessary, wanton pain or any other Eighth Amendment concern. This account portrays a quick death, without significant observed indications of pain or distress. This evidence does not establish that death by lethal injection is a cruel and unusual punishment.

Moreover, this Court agrees with *LaGrand v. Lewis*, 883 F.Supp. 460, 471 (D.Ariz.1995) that "lethal injection comports with current societal norms." As *LaGrand* noted, at least twenty-six states and the federal government have opted for the method of lethal injection, *id.* (citing *Fierro*, 865 F.Supp. 1387, 1406 (N.D.Cal.1994), *aff'd by* 77 F.3d 301 (9th Cir.1996)), and every court to consider the constitutionality of lethal objection has upheld its use. *Id.* (collecting cases). Lethal injection grows in popularity and is now the majority trend in the United States. *See e.g., Campbell v. Wood*, 18 F.3d 662 (9th Cir.1994) (discussing the growing use of lethal injection but finding hanging constitutional) (en banc), *cert. denied*, 511 U.S. 1119, 114 S.Ct. 2125, 128 L.Ed.2d 682 (1994).

Lambright does not make any argument that contemporary American society views lethal injection with the same distaste that he claims is evolving with respect to lethal gas. The Court has not discovered any such objective evidence. Therefore, Lambright has not shown that lethal injection violates the Eighth Amendment. Even assuming that lethal gas does offend contemporary notions of decency, the election afforded Lambright provides him a constitutional method of execution.

CONCLUSION

The Court has carefully reviewed the entire state record as well as the complete district court file. It has considered the arguments advanced by the parties and the applicable law. Based upon the foregoing, the Court finds no constitutional error allowing the Court to grant Lambright relief. Accordingly,

IT IS ORDERED that Joe Lambright's "Amended Petition for Writ of Habeas Corpus by a Person in State Custody" filed February 23, 1995 is DENIED and is DISMISSED WITH PREJUDICE.

IT IS FURTHER ORDERED that the Order staying execution originally issued on April 14, 1987, and subsequently continued, is VACATED.

APPENDIX E

Arizona Superior Court
Pima County

MICHAEL J. BROWN
Judge

No. CR-05669
Date: April 17, 1985

THE STATE OF ARIZONA
Plaintiff

ROBERT DOUGLAS SMITH
JOSEPH L. LAMBRIGHT
Defendant

MINUTE ENTRY

UNDER ADVISEMENT RULING
RE: RULE 32 PETITION FOR POST CONVICTION RELIEF

The defendant Smith and Lambright's application for post-conviction relief pursuant to Rule 32 of the Arizona Rules of Criminal Procedure raises the following issues:

* * *

MINUTE ENTRY
Page No. 7 Date April 7, 1985 Case No. CR-05669

THE COURT CONCLUDES that the defendants have presented no colorable claim nor is there an evidentiary hearing necessary.

- - - -

I. THAT COUSEL WAS INEFFECTIVE AND DID NOT COME UP TO THE MINIMAL STANDARDS PROMULGATED BY BOTH THIS COUR AND THE FEDERAL COURTS:

he memorandum sets our some 35 incidences or examples of that ineffectiveness, an example of which is number 28, "All of defendant Lambright's jury instructions were refused, see transcript of record 1235.", which neglects to recite that indeed, all the jury instructions were refused, both those from the State and those from

MINUTE ENTRY

Page No. 8 Date April 17, 1985 Case No. CR-05669

the defendants, nor is there any issue not foreclosed by the appellate courts as to the issue or appropriateness of the instructions given.

The ineffectiveness claim is not a colorable claim. The lengthy recitations in the petition when studied and reviewed against the reality [of] the trial represent merely another lawyer's guess at how witnesses should have been or might have been examined and perhaps how different tactics might have been used, all with the clarity of 20-20 hindsight. The trial court hear the motions as well as the trial and could not in good conscience find a genuine effectiveness argument. In addition, this case was appealed on behalf of Mr. Lambright by an experienced criminal appellate attorney, not the trial attorney, who examined the entire record and transcript and failed to raise the issue on appeal, a knowing, voluntary and intelligent waiver, therefore the defendant is precluded under Rule 32.2(a)(3), and the court finds that there is in fact no colorable claim of ineffectiveness.

* * *

MINUTE ENTRY

Page No. 11 Date April 17, 1985 Case No. CR-05669

THE COURT FINDS, in conclusion, that the defendant Lambright has presented no colorable claim nor would there be any purpose served in holding an evidentiary hearing.

The Rule 32 petitions of both of the defendants are therefore DENIED.

cc: Court Administrator (please send)
Attorney General, Barbara Jarrett, Esq. (Phoenix)

Alex A. Gaynes, Esq.
Department of Corrections, Dr. James Rickets
S. Alan Cook, Clerk, Arizona Supreme Court, Room 201 South West Wing, State Capitol, Phoenix, AZ 85007
Hon. Michael J. Brown
Under Advisement Clerk

APPENDIX F

ARIZONA SUPERIOR COURT, PIMA COUNTY

Judge: MICHAEL J. BROWN Case No. CR-05669
Court Reporter: NONE Date March 4, 1986

THE STATE OF ARIZONA
vs.
ROBERT D. SMITH
JOSEPH L. LAMBRIGHT

MINUTE ENTRY

RE: MOTION FOR REHEARING FROM DENIAL OF RULE 32:

This Court ruled on the defendant's petition for relief under Rule 32.1 on April 17, 1985. Petitioners subsequently moved for rehearing on the Court's decision on that Rule 32 petition in May of 1985; the continuing pendency of petitioners' motion for rehearing was not adequately brought to the Court's attention until this time.

The Court will address the motion for rehearing brought by the petitioner/defendant Smith which was joined in by the defendant Lambright, then address petitioner Smith's supplemental claims and those claims separately brought by the petitioner/defendant, Lambright.

Preliminarily, petitioners have objected to the facially

inconsistent determination by this Court on the Rule 32 petition, that the petitioners/defendants are precluded under Rule 32.2(a)(2) and (3). Issues set forth in Rule 32 petitions occasionally mirror those issues formally brought before the appellate court on direct appeal, but more usually are phrased broadly enough so that some portion of the issue may have been raised on direct appeal and some portion of the issue may have not been formally raised on direct appeal. In the latter case, the Court has found when it cites Rule 32.2(a)(3) as well as (2) that any portion of the claim presented in the Rule 32 petition that was not decided on direct appeal could

have been and should have been [raised] on direct appeal and is therefore knowingly, intelligently, and voluntarily waived, particularly in view of the inference the Court is entitled to find pursuant to Rule 32.2(c).

MINUTE ENTRY
Page No. 4 Date March 4, 1986 Case No. CR-05669

* * *

The additional "Lambright issues". . .

Ineffectiveness assistance of counsel.

Paragraph a - this issue existed factually prior to appeal; the Arizona Supreme Court looked at the entire sentencing process exhaustively, testing it for error of constitutional dimensions and found none. There is therefore the suggestion, and strong inference, that this claim is precluded under Rule 32.2(a)(2); however, [if] not, the Court finds that since it clearly could have been raised on direct appeal, that it has been knowingly, voluntarily and intelligently waived by failure to raise it, and is therefore precluded pursuant

MINUTE ENTRY
Page No. 5 Date March 4, 1986 Case No. CR-05669

to Rule 32.2(a)(c)[sic] and (c).

The Court notes that the defendant is entitled under the Sixth and Fourteenth Amendments to representation by counsel. He is not entitled to a perfect trial or an attorney who never made an error in either tactics or judgment; he is entitled to an attorney who meets at least minimal standards of competency, a reasonably competent criminal defense counsel.

The mere allegation some two plus years subsequent to the trial that counsel was "ineffective" or "incompetent" is not sufficient to raise a colorable claim under Rule 32. The defendant has indeed listed several anecdotal examples of what he perceives are examples of "ineffective assistance". The Court must view and does view those anecdotal recitations in the light of the entire trial, and counsel's performance. However stridently it is argued that current counsel would have "done it differently", or "competent counsel would have done it better", the fact remains that the Court must judge trial counsel's performance on the basis of the entire case, both pretrial, during trial, and at sentencing. In that light, the Court declines to find that there is a colorable claim of counsel's effectiveness, nor is there any question that any such errors of counsel affected the verdict or sentence in this case. They did not. . . .

IT IS ORDERED that the motions for rehearing are DENIED.

Counsel are advised with respect to all future filings in this case, that the original be filed with the Clerk's Office, and a copy simultaneously lodged with this Division.

cc: Barbara A. Jarrett, Esq. Asst. Attorney General, Phoenix
Alex A. Gaynes, Esq.
Lawrence H. Fleischman, Esq., Asst. Public Defender
Hon. Michael J. Brown
Accounting
Department of Corrections, Dr. James Rickets
A. Alan Cook, Clerk, Arizona Supreme Court

JAN 18 PAGE 2

(3)

No. 01-691

IN THE

SUPREME COURT OF THE UNITED STATES

TERRY L. STEWART, DIRECTOR,
ARIZONA DEPARTMENT OF CORRECTIONS,

Petitioners,

vs.

JOE LEONARD LAMBRIGHT,

Respondent.

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The Respondent asks leave to file the attached Brief in Opposition to Petition for Writ of Certiorari without prepayment of costs and to proceed *in forma pauperis*.

[X] Respondent has previously been granted leave to proceed *in forma pauperis* in the following courts:

Pima County Superior Court, Arizona Court of Appeals, Arizona Supreme Court, United States District Court, Ninth Circuit Court of Appeals, Supreme Court of the United States.

[ ] Respondent has not previously been granted leave to proceed *in forma pauperis* in any other court.

Respondent's declaration in support of this motion is attached hereto.

David P. Tiers
35 East University Boulevard
Tucson, Arizona 85705-7736
(520) 623-4274
Attorney for Respondent

31 pp

AFFIDAVIT OR DECLARATION IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, Joe Leonard Lambright, am the petitioner in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	Average monthly amount during the past 12 months		Amount expected next month	
	You	Spouse	You	Spouse
Employment	$ 0	$	$ 0	$
Self-employment	$ 0	$	$ 0	$
Income from real property (such as rental income)	$ 0	$	$ 0	$
Interest and dividends	$ 0	$	$ 0	$
Gifts	$ 0	$	$ 0	$
Alimony	$ 0	$	$ 0	$
Child Support	$ 0	$	$ 0	$
Retirement (such as social security, pensions, annuities, insurance)	$ 0	$	$ 0	$
Disability (such as social security, insurance payments)	$ 0	$	$ 0	$
Unemployment payments	$ 0	$	$ 0	$
Public-assistance (such as welfare)	$ 0	$	$ 0	$
Other (specify):	$ 0	$	$ 0	$
Total monthly income:	$ 0	$	$ 0	$

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
Not Applicable			$
			$
			$

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
Not Applicable			$
			$
			$

4. How much cash do you and your spouse have? $ 0
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial institution	Type of account	Amount you have	Amount your spouse has
Not Applicable		$	$
		$	$
		$	$

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

☐ Home
Value _____

☐ Other real estate
Value _____

☐ Motor Vehicle #1
Year, make & model _____
Value _____

☐ Motor Vehicle #2
Year, make & model _____
Value _____

☐ Other assets
Description _____
Value _____

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
Not Applicable	$	$
	$	$
	$	$

7. State the persons who rely on you or your spouse for support.

Name	Relationship	Age
Not Applicable		

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

Not Applicable

	You	Your spouse
Rent or home-mortgage payment (include lot rented for mobile home)	$ 0	$
Are real estate taxes included? ☐ Yes ☐ No Is property insurance included? ☐ Yes ☐ No		
Utilities (electricity, heating fuel, water, sewer, and telephone)	$ 0	$
Home maintenance (repairs and upkeep)	$ 0	$
Food	$ 0	$
Clothing	$ 0	$
Laundry and dry-cleaning	$ 0	$
Medical and dental expenses	$ 0	$

	You	Your spouse
Transportation (not including motor vehicle payments)	$ 0	$
Recreation, entertainment, newspapers, magazines, etc.	$ 0	$
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	$ 0	$
Life	$ 0	$
Health	$ 0	$
Motor Vehicle	$ 0	$
Other: _____	$ 0	$
Taxes (not deducted from wages or included in mortgage payments)		
(specify): _____	$ 0	$
Installment payments		
Motor Vehicle	$ 0	$
Credit card(s)	$ 0	$
Department store(s)	$ 0	$
Other: _____	$ 0	$
Alimony, maintenance, and support paid to others	$ 0	$
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$ 0	$
Other (specify): _____	$ 0	$
Total monthly expenses:	$ 0	$

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

☐ Yes ☒ No If yes, describe on an attached sheet.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? ☐ Yes ☒ No

If yes, how much? _____

If yes, state the attorney's name, address, and telephone number:

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

☐ Yes ☒ No

If yes, how much? _____

If yes, state the person's name, address, and telephone number:

12. Provide any other information that will help explain why you cannot pay the costs of this case.

I have been incarcerated since 1981 and on death row since 1982.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: 11/29, 2001

Joe L. Lambright
(Signature)

No. 01-691

In the

Supreme Court of the United States

◆

TERRY L. STEWART, DIRECTOR,
ARIZONA DEPARTMENT OF CORRECTIONS,

Petitioner,

v.

JOE LEONARD LAMBRIGHT,

Respondent.

◆

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

◆

BRIEF IN OPPOSITION

DAVID P. TIERS
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Tucson, Arizona 85705-7736
(520) 623-4274

Attorney for Respondent

QUESTIONS PRESENTED

I

DID THE NINTH CIRCUIT ERR IN ITS DETERMINATION THAT AT THE TIME OF PETITIONER'S DIRECT APPEAL, ARIZONA'S PROCEDURAL DEFAULT RULE WAS NOT SUFFICIENTLY CLEAR TO CONSTITUTE AN ADEQUATE GROUND TO PRECLUDE FEDERAL HABEAS REVIEW?

II

DID THE NINTH CIRCUIT ERR IN ITS DETERMINATION THAT THE STATE COURT DID NOT RELY ON AN INDEPENDENT STATE GROUND TO BAR FEDERAL HABEAS REVIEW?

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IN THE

SUPREME COURT OF THE UNITED STATES

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent respectfully prays that Petitioner's Petition for Writ of Certiorari to review the judgment below be denied.

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals appears at Appendix A to the Brief in Opposition and is reported at Lambright v. Stewart, 241 F.3d 1201 (9th Cir. 2001).

The Decision of the United States District Court of Arizona denying the Amended Petition appears at Appendix B to the Brief in Opposition and is reported at Lambright v. Lewis, 932 F. Supp. 1547 (D. Ariz. 1996).

JURISDICTION

The date on which the Ninth Circuit Court of Appeals decided the case was March 6, 2001.

A Petition for Rehearing and Suggestion for Rehearing En Banc filed by Petitioner was denied by the Ninth Circuit Court of Appeals on May 15, 2001. A copy of the Order denying rehearing appears at Appendix C to the Brief in Opposition.

The jurisdiction of this court is under 28 U.S.C. §1254(1).

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

1. Rule 32.2(a) of the Arizona Rules of Criminal Procedure

Rule 32.2. Preclusion of remedy

a. Preclusion. A petitioner will not be given relief under this rule based upon any ground:

(A) Still raisable on direct appeal under Rule 31 or on post trial motion under rule 24;
(B) Finally adjudicated on the merits on appeal or in any other previous collateral proceeding;
(C) Knowingly, voluntarily and intelligently not raised at trial, on appeal, or in any previous collateral proceeding.

✦

STATEMENT OF THE CASE

On March 30, 1982, a Pima County, Arizona jury found Respondent and his codefendant, Robert Douglas Smith, guilty of the crimes of kidnaping, sexual assault and first degree murder. (App. B). On May 27, 1982 the trial court sentenced Respondent to death on the murder conviction. (Id.) Smith was also sentenced to death. On direct appeal the Arizona Supreme Court affirmed the convictions and death sentences of both defendants. (Id.)

On October 24, 1984, Respondent filed his first Petition for Post-Conviction relief under Rule 32 of the Arizona Rules of Criminal Procedure in state court, alleging *inter alia*, that he had been denied his constitutional right to the effective assistance of counsel at trial and sentencing.. (Id.) On April 17, 1985, the trial court summarily denied Respondent's petition. (App. D.) Thereafter, Respondent filed a motion to rehear the trial court's denial of the Rule 32 petition. The Petition for Rehearing was denied on March 4, 1986. (App. E.) The trial court minute entry orders denying the initial petition and the petition for rehearing later formed the basis for the District Court's determination of procedural bar and are at issue in this Petition. The Arizona Supreme Court

denied review on July 9, 1986.

On April 14, 1987, Respondent filed a Petition for Writ of Habeas Corpus under 28 U.S.C. §2254 in the United States District Court for the District of Arizona in Tucson, Arizona. (App. B.) Because the Petition contained a number of unexhausted claims, the District Court dismissed the Petition without prejudice, but retained jurisdiction and continuing the stay of execution. (Id.) With new counsel, Respondent returned to state court with his second Rule 32 petition. The trial court again summarily denied Respondent's claims. The Arizona Supreme Court denied review on May 14, 1994.

Shortly thereafter, in preparation for the filing of an Amended Petition for Writ of Habeas Corpus, Respondent sought authorization from the District Court for funds to develop Respondent's ineffective assistance of counsel claims. In a series of orders the District Court denied these requests finding that Respondent's claim of ineffective assistance and been procedurally defaulted in state court. (App. B.)

On February 23, 1995, Respondent filed his Amended Petition for Writ of Habeas Corpus in District Court which included the claim of ineffective assistance of counsel raised in the first Rule 32 petition. In an Amended Memorandum Opinion and Order dated July 9, 1996, the District Court denied the Amended Petition, finding Respondent's ineffectiveness claim to have been waived and procedurally defaulted in state, and therefore barred from federal review. (App. B.)

On Appeal to the Ninth Circuit, the court granted relief on one of Respondent's trial claims (dual jury issue), but thereafter granted Petitioner's Motion for Rehearing En Banc and reversed the panel ruling. See, Lambright v. Stewart, 191 F.3d 1181 (9th Cir. 1999). The court then remanded the case to the original panel for consideration of Respondent's remaining claims. Id.

In Lambright v. Stewart, 241 F.3d 1201 (9th Cir. 2001), the court addressed the merits of

Respondent's ineffective of assistance of counsel claim, finding that at the time of Respondent's direct appeal, Arizona's procedural default rule was "so unclear that it did not provide the habeas petitioner with a fair opportunity to seek relief in state court." The court also found that even if the state procedural rule had clearly existed, "the state court's order ... does not "clearly and expressly" rest on an independent state ground so as to bar federal habeas review. The court found further that Respondent was entitled to an evidentiary hearing because he has raised a colorable claim of ineffective assistance of counsel and no state court had ever granted him an opportunity to develop his claim. (App. A.)

Petitioner filed a timely Petition for Rehearing and Suggestion for Rehearing En Banc of the decision in Lambright v. Stewart, and that Petition was denied by Order dated May 15, 2001. (App. C.) On August 13, 2001 Petitioner filed a timely Petition for Writ of Certiorari in this Court. The Petition was placed on the docket November 13, 2001.

✦

REASONS FOR DENYING THE WRIT

Respondent respectfully requests this Court to deny the Writ for the following reasons.

I.

THE COURT BELOW PROPERLY CONCLUDED THAT THE PROCEDURAL BAR APPLIED BY THE STATE COURT WAS NOT A REGULARLY ESTABLISHED OR CONSISTENTLY APPLIED RULE.

A. At The Time Of Respondent's Appeal No Arizona Procedural Rule Required Ineffective Assistance Of Counsel Claims To Be Raised On Direct Appeal.

Before a procedural default can be found to bar the implementation of federal constitutional rights, it must be shown that the procedural requirement was both "firmly established and regularly followed." James v. Kentucky, 466 U.S. 341, 348-49 (1984). See also Barr v. City of Columbia, 378

U.S. 146, 149 (1964) (state procedural rules "not strictly or regularly followed" may not bar our review). "Novelty in procedural requirements cannot be permitted to thwart review ...applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights." NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 457-458 (1958). Even if the rule appeared "in retrospect to form part of a consistent pattern of procedures," a state procedural rule cannot be applied if the defendant could not be "deemed to have been apprised of its existence." Id., at 457.

Here, no rule "even remotely satisf[ies] the James requirement . . . that an adequate and independent state procedural bar to the entertainment of constitutional claims [be] firmly established and regularly followed" at the time it was to be applied. Ford v. Georgia, 498 U.S. 411, 424 (1991). As the lower court properly found, at the time of petitioner's appeal, Arizona's procedural law did not require that ineffective assistance of counsel claims be raised on appeal. Lambright v. Stewart, 241 F.3d 1201, 1203 (9th Cir. 2001). In fact, and as recognized by the Ninth Circuit, no such rule has ever existed in Arizona law. Before and after 1983 (when Respondent's direct appeal was decided), competency claims against trial counsel were routinely raised for the first time in state postconviction proceedings, and no findings of waiver or preclusion were made. State v. Nunez, 135 Ariz. 257, 660 P.2d 858 (1983); State v. Thompson, 139 Ariz. 552, 679 P.2d 575 (App. 1984); State v. Gerlaugh, 144 Ariz. 449, 698 P.2d 694 (1985); State v. Stone, 151 Ariz. 455, 728 P.2d 674 (App.1986); State v. Fisher, 152 Ariz. 116, 730 P.2d 825 (1986).[1]

---

[1]These cases disprove Petitioner's claim that it "was the regular practice ... to raise ineffective counsel claims on direct appeal..." Petition, p. 15 n.4. While claims of ineffective assistance of counsel were, from time to time raised on direct appeal, in many other cases they were not. Moreover, a "regular practice" may not be a "firmly established and regularly followed" rule at the time of petitioner's purported default requiring ineffectiveness claims to be raised on direct appeal. Ford v. Georgia, 498 U.S. at 423-424.

Nor did the lower court, as Petitioner contends, contradict or implicitly reject Carriger v. Lewis, 971 F.2d 329 (9th Cir. 1992)(en banc). As the lower court noted, its holding in Carriger did not control the decision in this case. Carriger was argued and decided on different grounds.

> We were not, however, faced with the same challenge we confronted here: that the paraticular procedural default rule the state court relied on was insufficiently clear, in light of the rule prohibiting claims that relied on evidence outside the record from being raised on appeal, to bar federal review.

Lambright v. Stewart, 241 F.3d at 1204 n. 3.

Moreover, and as explained more fully below, that case addressed an entirely different aspect of Arizona's procedural default rule: whether additional aspects of a claim raised in state postconviction proceedings that had previously been raised on direct appeal were subject to procedural default. Carriger v. Lewis, 971 F.2d at 333. Here, unlike Carriger, no claim of ineffective assistance of counsel was raised on direct appeal. Rather, all ineffectiveness claims were raised for the first time in state postconviction proceedings. Lambright v. Stewart, 241 F.3d at 1203. In addition, and as also set forth more fully below, Carriger rejected state claims that ineffective assistance of counsel at sentencing claims, raised for the first time in state postconviction proceedings, were procedurally defaulted, even though ineffective trial counsel claims had been raised on direct appeal. State v. Carriger, 132 Ariz. 301, 304, 645 P.2d 816, 819 (1982). The lower court's decision does not contradict Carriger v. Lewis, or any other circuit court decision.

Because Petitioner can no cite no case to clearly establish the purported procedural rule requiring ineffective assistance of counsel claims to be raised on direct appeal, it is forced to argue that this Court should grant certiorari and reverse the lower court because 1) Respondent's appellate counsel had "actual notice" that he was required to raise ineffective claims on appeal, and 2) that Arizona had a general procedural rule subjecting all claims, of every type and kind, that were

"[k]nowingly, voluntarily and intelligently not raised ... on appeal" to a finding of waiver. Ariz.R.Crim.P. 32.2(a). These propositions are belied by the facts.

B. Appellate Counsel Did Not Believe That Ineffective Counsel Claims Had To Be Raised On Direct Appeal.

Petitioner's contention that Respondent's appellate counsel had "actual knowledge" that he was required to raise his ineffectiveness claims on direct appeal, but simply "chose not to" raise them, fatally misrepresents the contents of the affidavit at issue. Petition, p. 5. n 2. In fact, appellate counsel said just the opposite:

> [A]t the time of my representation in this case I was not aware of any Arizona state procedural rule requiring that a claim of ineffective assistance of trial counsel must be raised on direct appeal or thereafter be waived and precluded from later review in state or federal court.

App. G (emphasis added).

The language Petitioner relies on from counsel's affidavit to argue otherwise addresses an entirely different point: that had counsel known he was required to raise ineffective claims on direct appeal and "had" he "reviewed" the record in search of such claims, he would have raised counsel's ineffectiveness at trial and sentencing. Id. That statement does not evince counsel's knowledge that a rule required such claims be raised on appeal. As counsel previously unequivocally stated, he "was not aware of any" such rule. That is not surprising, since as the court below properly found, no such rule existed. Lambright v. Stewart, 241 F.3d at 1203.

Petitioner next relies on the District Court's conclusion that counsel's affidavit "indicates that Lambright's appellate counsel knew that ineffectiveness *could* be raised on direct appeal." Petition, p. 5 (emphasis in original). At most, this excerpt suggests that appellate counsel may have been aware that a claim of ineffective assistance of counsel, based on the trial court record, could have been raised on direct appeal. Such awareness is entirely consistent with the belief that no state

procedural rule required such a claim to be raised. Appellate counsel unambiguously stated in his affidavit that "he was not aware of any Arizona state procedural rule requiring that a claim of ineffective assistance of trial counsel must be raised on direct appeal...." (App. G.) Additionally, and as noted by the court below, Arizona law has always been clear that review on direct appeal is limited to matters appearing in the trial court record. Id., 241 F.3d at 1204. Because of this limitation, had Respondent chosen to raise his extra-record ineffectiveness claims on direct appeal, he would have been denied an adequate forum in which to raise his claims. As noted in State v. Zuck, 134 Ariz. 509, 658 P.2d 162, 168 (1982),

> "[W]here the issue of competency of trial counsel has been raised, we have always resolved the matter with whatever was before us in the record and without giving trial counsel an opportunity to be heard."

Moreover, and as also explained above, had counsel decided to raise record-based ineffective trial counsel claims on appeal, any ineffective trial counsel claims discovered in later state postconviction proceedings based on outside record investigation, could be found waived. See State v. Carriger, 143 Ariz. 142, 147, 692 P.2d 991, 996 (1984)(where defendant "intentionally sought substitute appellate counsel in order to raise claims of ineffective assistance of counsel,"and did raise such claims on appeal, defendant found to have knowingly, voluntarily and intelligently waived later ineffective counsel claims discovered in state postconviction proceedings).[2]

---

[2]Petitioner misrepresents the lesson of State v. Carriger, supra. See Petition, pp. 14-15. Carriger did not announce or confirm a rule requiring ineffective counsel claims be raised on direct appeal. All Carriger stands for is the unremarkable proposition that if a defendant makes a deliberate decision to raise claims of ineffective counsel on appeal--which it concluded the defendant in Carriger did based on the defendant's specific statements and conduct--other instances of trial counsel's ineffectiveness, even those based on outside record investigation, are subject to a finding that they were knowingly, voluntarily and intelligently waived. State v. Carriger, 143 Ariz. at 147, 692 P.2d at 996. Carriger also makes clear, however, that such a finding of waiver does not reach claims of ineffective sentencing counsel not raised on direct appeal. Id.; State v. Carriger, 132 Ariz. at 304, 645 P.2d at 819.

However, even in that stark setting, where counsel chose to raise a record based ineffective assistance of counsel at trial claim on direct appeal, Arizona law nevertheless permitted the defendant to raise ineffective assistance of counsel at sentencing claims in later state postconviction proceedings. State v. Carriger, 132 Ariz. 301, 304, 645 P.2d 816, 819 (1982)(finding counsel at sentencing to have been ineffective and remanding for a new sentencing hearing, noting that defendant's prior appeal did not raise "inadequate representation at the sentencing," and rejecting state's arguments of procedural bar). Even if this Court were to accept Petitioner's argument that ineffective trial counsel claims were required to be raised on direct appeal, Carriger clearly established that ineffective sentencing counsel claims could be raised for the first time in a later state postconviction proceeding. Id.

C. Arizona's General Procedural Default Rule Did Not Require That Ineffective Assistance Of Counsel Claims Be Raised On Direct Appeal.

Petitioner's second attempt to establish a procedural default where none exists, is to argue that Arizona's general procedural default rule was clearly established by Ariz.R.Crim.P. 32. That attempt fails as well.

Arizona's general procedural default rule in existence at the time of Respondent's direct appeal, did not require that ineffective counsel claims be raised on direct appeal. It stated only, that "any ground" "[k]nowingly, voluntarily and intelligently not raised at trial, on appeal, or in any previous collateral proceeding" was subject to a finding of waiver. Ariz.R.Crim.P. 32.2(a)(3). As set forth above, ineffective assistance of counsel claims, based on both the trial court record and outside record facts, were not subject to this general waiver rule when raised for the first time in postconviction proceedings. See, e.g., State v. Nunez, supra; State v. Thompson, supra; State v. Gerlaugh, supra; State v. Stone, supra; State v. Fisher, supra. That is not surprising, since review

on direct appeal was limited strictly to matters appearing in the trial court record and, as the lower court and Arizona courts recognize, most successful ineffective counsel claims require an investigation of facts not contained in the appellate record. Lambright v. Stewart, 241 F.3d at 1204; State v. Watson, 114 Ariz. 1, 14-15, 559 P.2d 121, 134-135 (1976), cert. denied, 430 U.S. 986 (1977)(record-based ineffective counsel at trial claim raised on appeal denied, but hearing needed to resolve extra-record allegations of ineffective counsel raised in postconviction proceedings brought under Ariz.R.Crim.P. 32). Additionally, because a record based claim of ineffective trial counsel raised on appeal subjected other allegations supporting that claim based on outside record facts to a finding of procedural default, State v. Carriger, 143 Ariz. at 147, 692 P.2d at 996, prudent counsel would not raise any part of an ineffectiveness claim on direct appeal.

Petitioner's claim that the purported requirement to raise all claims on direct appeal was "not obviated" by the "possibility" that a claim of ineffective assistance might involve matters outside the trial court record, because an appeal could be stayed pending the resolution of a Rule 32 petition, implicitly acknowledges the inconsistency of its own position. Arizona Rule of Criminal Procedure 31.4, did provide that an appellate court could stay an appeal, "while a ... petition under Rule 32 is pending." However, as the lower court fully recognized and as petitioner now tacitly concedes, a postconviction proceeding under Rule 32, rather that a direct appeal, was always the proper forum in which to raise ineffectiveness claims. Lambright v. Stewart, 241 F.3d at 1204. Whatever ambiguity may have existed in the past regarding the appropriate forum in which to raise ineffective assistance of counsel claims was resolved fully by the Arizona Supreme Court in 1989. "If the defendant wishes to raise an ineffective assistance of counsel issue, he should ordinarily begin someplace other than this court." State v. Valdez, 160 Ariz. 9, 770 P.2d 313, 318 (1989).

Nor did the lower court, as Petitioner contends, find that a state rule is not adequate, "unless expressed in a judicial decision applying it to a similar issue." After rejecting the state's continued reliance on State v. Zuck, as support for the contention that such a rule existed, the lower court specifically examined and rejected Petitioner's alternative reliance on Rule 32.2's general procedural default rule. Having fully considered both judicial decisions and Arizona's procedural default rule, there is no conflict with the Ninth Circuit's own decision in Bargas v. Burns, 179 F.3d 1207, 1212 (9th Cir. 1999). Bargas held quite simply, that "where a state procedural rule is sufficiently clear to put a petitioner on notice that he must raise all claims or risk default, the petitioner must raise all claims." (emphasis added.) Arizona's procedural rule was not sufficiently clear, either from judicial decision or black letter law.

As explained above, Arizona's general procedural default rule did not prohibit ineffective assistance of counsel at sentencing claims raised for the first time in state postconviction proceedings, even when ineffective trial counsel claims were raised and decided on direct appeal. See State v. Carriger, 132 Ariz. at 304, 645 P.2d at 819. The review of judicial decisions and Arizona's general procedural default rule clearly demonstrate that the lower court ruling does not conflict in any way with any of this Court's decisions or decisions of other circuit courts.

II.

THE STATE COURT'S PROCEDURAL RULING DID NOT FORECLOSE FEDERAL REVIEW.

A. The State Court's Last Reasoned Opinion Rejected The Incompetent Counsel Claim Because It Had Previously Been Adjudicated On Direct Appeal.

Alternatively, the lower court concluded that even if a procedural default rule clearly existed that required ineffective counsel claims be raised on direct appeal, the state court's order "does not

'clearly and expressly' rest on such a rule." Lambright v. Stewart, 241 F.3d at 1205. In reaching this conclusion, the circuit court did not stray from this Court's settled case law.

The federal court looks to the "last reasoned opinion on the claim" to determine whether a state procedural ruling bars federal review. Ylst v. Nunnemaker, 501 U.S. 797, 804 (1991). The last explained state court judgment must "'clearly and expressly'" rely on an adequate state procedural bar before federal review can be denied. Harris v. Reed, 489 U.S. 255, 263 (1989)(quoting Caldwell v. Mississippi, 472 U.S. 320, 327 (1985)).

The circuit court below properly applied these principles. Lambright v. Stewart, 241 F.3d at 1205. Because the Arizona Supreme Court order denying the petition for review from the trial court's order denying postconviction relief was silent, the circuit court looked at the last reasoned opinion of the state trial court. Id. As all agree, see Petition, p. 17, that opinion was the trial court's order denying Respondent's motion for reconsideration. What the state trial court said about the incompetent counsel claim was this:

> Ineffective assistance of counsel.
> Paragraph a--this issue existed factually prior to appeal; the Arizona Supreme Court looked at the entire sentencing process exhaustively, testing it for error of constitutional dimensions and found none. There is therefore the suggestion, and strong inference, that this claim is precluded under Rule 32.2(a)(2); however, it [sic] not, the Court finds that since it clearly could have been raised on direct appeal, that it has been knowingly, voluntarily and intelligently waived by failure to raise it, and is therefore precluded pursuant to Rule 32(a)(c) and (c).

Id. The state court's first ruling then rests on its finding that a "strong inference" demonstrates that the claim of ineffective sentencing counsel was decided and rejected on direct appeal by the Arizona Supreme Court when it "looked at the entire sentencing process exhaustively." Based on this finding, the state court found this claim "therefore" "precluded" under Ariz.R.Crim.P. 32.2(a)(2). Id. Ariz.R.Crim.P. 32.2(a)(2) bars from further state court review claims that were already "[f]inally

adjudicated on the merits on appeal or in any previous collateral proceeding." Ariz.R.Crim.P. 32.2(a)(2).

The state trial court's determination that the incompetent counsel claim had already been adjudicated on direct appeal, and was thus res judicata, however, is not an independent and adequate state law ground barring federal review. As this Court previously explained, the "effect of such state court rules "on the availability of federal habeas is nil...." Ylst v. Nunnemaker, 501 U.S. 797, 804 n.3 (1991). That is because a state court rule "preventing the relitigation on state habeas of claims raised on direct appeal" is "not a procedural bar in the traditional sense." Bennett v. Whitley, 41 F.3d 1581, 1583 (5th Cir.1994). All such a rule decides is that the state court will not reconsider the same claim previously considered and rejected in an earlier state appeal.

After finding this strong inference that the ineffective counsel claim had been previously adjudicated and denied on the merits (a finding that does not bar federal review), the state court made a second finding: that if the claim were not reviewed on direct appeal as it strongly inferred it was, it would be waived under Ariz.R.Crim.P. "32(a)(c) and (c)." Assuming the state court meant to refer to Ariz.R.Crim.P. 32.2(a)(3), that rule bars claims from state court review that could have been raised earlier but were knowingly, voluntarily and intelligently waived.

As the lower court correctly found, these two simultaneous conclusions are "mixed and inconsistent." Lambright v. Stewart, 241 F.3d at 1206. They are, at best, ambiguous, and do not "clearly and expressly" invoke a procedural bar to federal review. Harris v. Reed, 489 U.S. at 263.

Petitioner first complains that the lower court's holding misapplies Harris v. Reed, 489 U.S. 255, 263 (1989), because the state court ruling "certainly" does not rest on federal law. Petition, p. 18. Petitioner is wrong. The state court's ruling that sentencing counsel's ineffectiveness was "exhaustively" considered and rejected by the Arizona Supreme Court "for error of constitutional

dimensions"does indeed fairly appear to invoke federal law. Arizona reviews claims of incompetent counsel under the Sixth Amendment. See e.g., State v. Lee, 142 Ariz. 210, 214, 689 P.2d 153, 157 (1984) (adopting Strickland v. Washington, 466 U.S. 668 (1984) test for reviewing ineffective counsel claims under sixth amendment). Because the trial court found that the claim had already been reviewed and rejected on the merits, the claim could not be adjudicated again. That ruling does not bar federal review. Ylst v. Nunnemaker, 501 U.S. at 804 n.3.

Contrary to Petitioner's argument, the state court's ruling, thus, is entirely unlike that in Coleman v. Thompson, 501 U.S. 722 (1991), where the state supreme court "stated plainly" that it was granting the state's motion to dismiss "based solely on Coleman's failure to meet the Supreme Court's time requirements." Id., at 740. Here, the state court denied Respondent's incompetent counsel claim because it had previously been "exhaustively" reviewed and rejected on direct appeal. The state court rule barring relitigation of claims considered on direct appeal does not prevent federal review. Ylst v. Nunnemaker, 501 U.S. at 804 n.3.

As we have also shown, the circuit court decision also does not misapply Harris. The state court ruling plainly stated its strong inference that the incompetent counsel claim had already been adjudicated on the merits on direct appeal during the state supreme court's "exhaustive[]" review. It then went on to note that if that were not so, then the claim would be barred from review because it was knowingly, voluntarily and intelligently not raised on direct appeal.

Given the strong inference that this claim had already been considered and rejected on the merits, and absent a clear statement that the claim is barred because it was not raised in the direct appeal, federal review is not barred. See Levine v. Torvik, 986 F.2d 1506, 1517 (6th Cir.1993), cert denied, 509 U.S. 907 (1993)(federal review not barred where state court found that "the defendant has waived these claims since he failed to raise them with the trial court. ... Furthermore, this court

in substance addressed and overruled these claims in the defendant's prior appeal...."). The state trial court's language that a strong inference existed that this claim had previously been considered and rejected on the merits is not an "independent state ground" precluding federal review. But even assuming ambiguity in the state trial court's ruling, such ambiguity is insufficient to preclude review of this claim. Coleman v. Thompson, 501 U.S. at 735. See also, Tankleff v. Senkowski, 135 F.3d 235, 247 (2nd Cir. 1998)(state trial court ruling that the defendant's contentions are "either meritless or unpreserved" is not a clear and express statement that the judgment rests on procedural bar precluding federal review).

B. The State Court's Second To Last Reasoned Opinion Rejected The Incompetent Counsel Claim Because It Was Meritless.

Realizing the consequences of the state court's last reasoned opinion finding the incompetent counsel claim had previously been adjudicated and rejected on direct appeal, Petitioner changes positions and argues that the court below should have considered the state trial court's second to last reasoned order denying relief on the incompetent counsel claim. Petition, p. 21. Of course, that is not what Ylst requires. But even a review of that order does not help Petitioner.

In the first order denying relief on this claim, the trial court clearly rejected the claim on the merits. After discussing the allegations of the claim, it found it "[t]he ineffective claim is not a colorable claim." (App D.) Under Arizona law, a claim is colorable if assuming "defendant's allegations are true," they "might have changed the outcome." State v. Watton, 164 Ariz. 323, 328, 793 P.2d 80, 85 (1990) (citing State v. Schrock, 149 Ariz. 433, 441, 719 P.2d 1049, 1057 (1986)). See also Ariz.Crim.P. Rule 32.6. That, of course, is a clear and express ruling on the merits.

The state court's later passing mention of a procedural default based on the failure of appellate counsel to raise the claim on direct appeal does not change its earlier ruling expressly

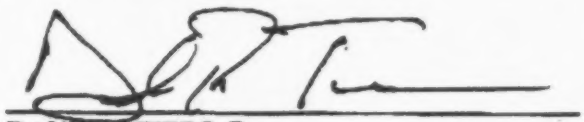
rejecting the claim on the merits. The procedural ruling is plainly an alternative one that does not preclude federal review. See Jenkins v. Nelson, 157 F.3d 485, 491 (7th Cir. 1998), cert. denied, 527 U.S. 1039 (1999)(no procedural default occurs if the state court's alternative finding constituted a finding on the merits.); where it is unclear if the state court dismissed the petition because of a state law procedural default or on the merits of the petitioner's federal constitutional claims, federal review of a claim is not precluded). Here, the alternative finding was plainly an afterthought. The state court's decision "rested primarily on resolution" of the incompetency claim. Coleman v. Thompson, 501 U.S. at 735.

But of course it is to the state court's last reasoned opinion to which the federal courts must look, as the court below did here. That opinion rejected the state court's earlier mention of procedural default for failing to raise the claim on direct appeal. It found instead a strong inference that the claim had in fact been considered and rejected on the merits by the state appellate court in the direct appeal. It is that court's final word on which the circuit court below reasonably and rightly relied, following the mandates of Harris, Ylst and Coleman.

CONCLUSION

For all these reason, certiorari must be denied. Nothing about the panel's analysis is either incorrect or exceptional, and nothing contravenes this Court's decisions or that of other circuit courts. The panel's conclusion remanding this case for an evidentiary hearing applied settled principles to the facts here and was correct. Certiorari should be denied. See U.S.S.Ct.R. 10.

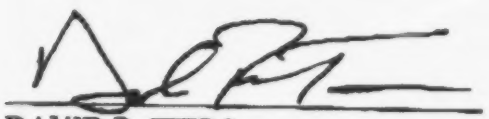
RESPECTFULLY Submitted this 13 Day of December, 2001.



DAVID P. TIERS, Esq.
Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of December, 2001, I caused the Respondent JOE LEONARD LAMBRIGHT's Brief in Opposition to be served by causing one copy of the brief to be mailed, postage pre-paid, to **Bruce Ferg, Assistant Arizona Attorney General, 400 West Congress Street, Suite S-315, Tucson, Arizona, 85701,** counsel for the petitioner.



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No. 01-691

Supreme Court, U.S.
FILED
JAN 14 2002
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

TERRY L. STEWART,
Director, Arizona Dept. of Corrections, et al.,
PETITIONERS,

-vs-

JOE LEONARD LAMBRIGHT,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF

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QUESTIONS PRESENTED FOR REVIEW

CAPITAL CASE

1. May a federal court excuse a habeas petitioner's state court procedural default on the basis that the state rule was not sufficiently clear to be an "adequate" ground of decision when the record shows the defense counsel actually understood what was required by the rule when he violated it, so he was not misled and his default was not caused by the hypothetical lack of clarity in the rule?

2. May a state procedural requirement be sufficiently established by published rules alone to provide an "adequate" ground of decision that will prevent federal review, but if not, was the Arizona requirement that ineffective assistance of counsel claims be raised on direct appeal sufficiently established by cases existing prior to the appeal in this case?

3. If a state court ruling denying relief does not fairly appear to rest primarily upon federal law (the necessary predicate to application of the *Harris v. Reed* presumption), but does discuss both state-law procedural default and the federal-law merits of the claim, may federal habeas courts ignore the intended procedural default ruling in order to review the merits of the federal-law issue?

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REASONS THE WRIT SHOULD ISSUE

I

DEFENSE COUNSEL'S FAILURE TO RAISE INEFFECTIVE ASSISTANCE CLAIMS ON DIRECT APPEAL, DESPITE KNOWING HE WAS REQUIRED TO DO SO, MEANS THE NINTH CIRCUIT ERRED IN HOLDING LAMBRIGHT'S CLAIM REVIEWABLE IN HABEAS PROCEEDINGS.

The Arizona trial court ruled Lambright was not entitled to consideration of a claim that his trial attorney had been ineffective during sentencing because that claim should have been presented during direct appeal, not in the subsequent post-conviction relief ("Rule 32") proceeding. A habeas petitioner is not required to comply with a state procedural rule which is so unclear it does not provide him "a fair opportunity to seek relief in state court." *Lambright v. Stewart*, 241 F.3d 1201, 1203 (9th Cir. 2001). The Ninth Circuit deemed Arizona law insufficiently clear whether it was necessary for Lambright to raise ineffectiveness claims in his direct appeal, and so concluded he was not bound by that procedural requirement. 241 F.3d at 1203–06.

That ruling is erroneous, because Lambright's counsel (Thomas G. Martin) possessed *actual* knowledge of the necessity to argue ineffectiveness claims on direct appeal, and therefore *did* have the fair notice of the procedural rule demanded by the "adequate and independent state ground" doctrine. (Pet. at 4–8.) Lambright contends the point is not well taken, because an affidavit from Martin indicates he did not have such knowledge. (Brief in Opposition, hereafter "Opp.", at 7–9.)[1]

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1. Lambright telescopes Petitioner's three "Questions Presented" into two, and buries discussion of this threshold issue in a multi-part legal argument. That is more confusing than helpful, so the arrangement of the Petition is retained herein.

The affidavit is not nearly as supportive of the Ninth Circuit's decision as Lambright believes. Indeed, the District Court found that Martin had effectively conceded he *did* know he should raise the ineffectiveness claims during the direct appeal, and that the reason he did not do so was his belief that the relevant legal standard rendered the claim meritless:

> [Lambright's] appellate counsel's affidavit states that counsel was not aware of a procedural rule requiring ineffectiveness claims be brought on direct appeal and he did not so inform Lambright. Appellate counsel would have indeed been hard pressed to find a procedural rule that specifically stated that ineffective assistance of counsel claims must be raised on direct appeal. . . . There is no case or rule that exhausts the list of possible issues to be raised on appeal. Rather, there is a body of Arizona Supreme Court law which, as discussed above [932 F. Supp. at 1562–63, Supp. App. to Pet. at D-13 to D-14], required presentation of ineffectiveness claims on direct appeal. Further, Rule 32 provides that unless a claim is exempted, if it could have been brought on direct appeal, it is included in 32.2(a)(3). The appellate lawyer stated in his affidavit that he would have raised ineffectiveness on appeal had he reviewed the record under *Strickland*.[2] This indicates that Lambright's appellate counsel knew that ineffectiveness *could* be raised on direct appeal. The mere fact that counsel failed to recognize the factual or legal basis for a claim or failed to raise the claim despite recognizing it does not overcome a procedural default. *Murray v. Carrier*, 477 U.S. 478, 487–89, 106 S. Ct. 2639, 2645–46, 91 L.Ed.2d 397 (1986).

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2. The affidavit states: "5. That had I reviewed the performance of counsel under the standards set forth in the matter of Strickland v. Washington, *I would have put forth the argument on direct appeal that the representation afforded Mr. Lambright at trial and sentencing was constitutionally deficient*." (Opp. App. G, emphasis added.)

Lambright v. Lewis, 932 F. Supp. 1547, 1563 (D. Ariz. 1996) (Supp. App. to Pet. at D-15 to D-16) (emphasis in original).

Thus, while Martin may not have been "aware" of an "Arizona state procedural rule" requiring *in haec verba* that ineffectiveness claims be raised in the direct appeal or be forfeited, that merely reflects that no such pin-point provision existed. Paragraph 5 of the affidavit, however, necessarily implies that he understood that ineffectiveness claims must be raised on direct appeal. Arizona had used the "farce, shame, or mockery of justice" standard for ineffectiveness claims; the less demanding test of *Strickland v. Washington*, 466 U.S. 668 (1984), was adopted in *State v. Lee*, 142 Ariz. 210, 213–14, 689 P.2d 153, 156–57 (1984), shortly after Lambright's appeal. Hence, in stating that if he had reviewed the case with an eye to *Strickland* he would have argued ineffectiveness on direct appeal, Martin shows he knew ineffectiveness claims had to be raised on appeal (if at all), but chose not to, because of the small likelihood of success under the then-current standard of review.

Why should this Court care whether Martin knew ineffectiveness claims should be raised in Lambright's direct appeal? Because *Ford v. Georgia*, 498 U.S. 411, 423 (1991), makes clear that the fundamental concern behind the "adequacy" element of the "adequate and independent state ground" doctrine is notice to the defendant of what is required of him. The necessary corollary is that defendants possessing actual knowledge of state procedural requirements do *not* act "justifi[ably]" in ignoring them, and (contrary to the Ninth Circuit decision here) *do* forfeit federal review through noncompliance. *Henry v. Mississippi*, 379 U.S. 443, 449–51 (1965).

The Ninth Circuit's conclusion that the Arizona procedural rule was inadequate is pure sophistry, ignoring the finding that Lambright's counsel *knew* he could raise ineffectiveness claims on direct appeal. Refusing enforcement of an independent state procedural ground the defense actually knew of because some hypothetical attorney might have missed it denies to the States the equity fundamental to habeas

proceedings. The Ninth Circuit's contravention of *Ford* and *Henry* amply warrants certiorari.

II

THE ARIZONA REQUIREMENT TO RAISE INEFFECTIVE ASSISTANCE CLAIMS ON DIRECT APPEAL WAS CLEAR ENOUGH TO BIND LAMBRIGHT AND THE NINTH CIRCUIT.

The Ninth Circuit held Lambright's failure to raise the ineffectiveness claim on direct appeal not an adequate default to bar federal review: "Since Lambright's ineffective assistance of counsel claim required factual development, Rule 32.2 did not clearly require that he raise it on appeal. *In fact, Arizona's procedural rules required that he wait until state postconviction proceedings to raise it.*" 241 F.3d at 1204 (emphasis added). Indeed, Lambright boldly asserts that no rule requiring presentation during direct appeal ever existed in Arizona. (Opp. at 5.) Both are patently wrong.

Arizona Rule of Criminal Procedure 32.2 stated at the times pertinent to this case:

> **a. Preclusion.** A petitioner will not be given relief under this rule based on any ground:
>
> (3) Knowingly, voluntarily and intelligently not raised at trial, on appeal, or in any previous collateral proceeding.

Lambright's awareness of the necessity to raise *all* claims in the direct appeal, including trial attorney competence, is shown by his request for appointment of *new counsel* to conduct his appeal. *Lambright v. Lewis*, 932 F. Supp. at 1563 (Supp. App. to Pet. at D-15).

Lambright was sentenced in 1982. In *State v. Carriger*, 143 Ariz. 142, 145–46, 692 P.2d 991, 994–95 (1984), the Arizona Supreme Court plainly stated, "***Important policy considerations require that all***

claims be raised in the appeal." (Emphasis added.) Although *Carriger* postdates Lambright's appeal, it refers to "the necessity of raising competency of counsel issues on appeal" as something Carriger was aware of in *1978*. (*Id.*) Thus, the need to raise these claims in the appeal was known well before Lambright's case.

This knowledge came from decisional law. *State v. Herrera*, 121 Ariz. 12, 14, 588 P.2d 305, 307 (1978), held a defendant who received the required information about his appeal rights but did not appeal could properly be inferred to have knowingly waived his right to appeal. Citing *Herrera*, the Arizona Court of Appeals held that, "Rule 32.2 provides that the trial court may infer from the lack of appeal that the petitioner knowingly, voluntarily and intentionally relinquished *any right to raise issues in connection with his original conviction.*" *State v. Salazar*, 122 Ariz. 404, 406, 595 P.2d 196, 198 (App. 1979) (emphasis added).

Hence, failure to raise on appeal *any* claim which could have been raised *was* understood to default such claims in post-appeal Rule 32's, and that requirement persisted even if an ineffectiveness claim needed factual development. As explained in the Petition (11–12, 15–16), provision was made to stay appeals, so a record-enhancing Rule 32 proceeding could be conducted *while the appeal was still pending* and all issues could then be resolved *in the appeal* on the basis of the expanded record. (Rule 31.4, Ariz. R. Crim. P.—which, like *Carriger, Herrera*, and *Salazar*, was ignored by the Ninth Circuit.) "Any complaint that the direct appellate process is insufficient due to its limited ability to conduct fact-finding should have been addressed to the appellate court, who could, and frequently did in other cases, stay its proceedings to allow fact-finding in the trial court." *Lambright v. Lewis*, 932 F. Supp. at 1562 (Supp. App. to Pet. at D-13). Thus, if further facts about alleged ineffectiveness were needed, the claim

still had to be *raised* during the appeal and a stay obtained; failure to do so resulted in preclusion in a post-appeal Rule 32.[3]

This requirement was clearly understood by the Arizona legal community, and applied with regularity.

> Lambright's ineffective[ness] claim would not have been forfeited, had he followed the established procedure explained in *Watson* and *Carriger*. In sum, Lambright was provided a real and meaningful opportunity to make his ineffectiveness claim on direct appeal. That opportunity was not so ill-defined as to justify excusing Lambright's failure.

Lambright v. Lewis, 932 F. Supp. at 1562 (Supp. App. to Pet. at D-13 to D-14).

This Court found adequate in *Stewart v. LaGrand*, 526 U.S. 115, 120 (1999), the same rule the Ninth Circuit refuses to apply to Lambright, and no subsequent Arizona decision undermines that rule.

> To be sure, we do not normally grant petitions for certiorari solely to review what purports to be an application of state law, but we have done so, and undoubtedly should do so where the alternative is allowing blatant federal-court nullification of state law. The dissent argues that "[t]he

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3. Lambright cites five cases to show that around his appeal ineffectiveness was "routinely" raised for the first time in Rule 32's without being precluded. (Opp. at 5.) However, *State v. Nunez*, 135 Ariz. 257, 660 P.2d 858 (1983), and *State v. Gerlaugh*, 144 Ariz. 449, 698 P.2d 694 (1985), involved novel issues (retroactivity of new legal standards), and claims of significant changes in the law are exempt from preclusion. Rules 32.1(g) and 32.2(b), Ariz. R. Crim. P. That leaves only three opinions, and in *State v. Thompson*, 139 Ariz. 552, 555, 679 P.2d 575, 578 (App. 1984), the County Attorney was chastised for *not* having argued preclusion. If a procedural default rule is applied in the "vast majority of cases," occasional instances in which the state judiciary extends mercy (or, presumably, a prosecutor neglects to make a preclusion argument) do not render the rule inadequate. *Dugger v. Adams*, 489 U.S. 401, 410–12 n.6 (1989) (five arguably deviant decisions insufficient to defeat adequacy of rule).

> doctrine of judicial restraint weighs against review, but it is an odd notion of judicial restraint that would compel us to cast a blind eye on overreaching by lower federal courts.

Leavitt v. Jane L., 518 U.S. 137, 144–45 (1996) (citations omitted) (general presumption that courts of appeals correctly decide questions of state law merely reflects a judgment as to the typical utility of review, so this Court is free to differ, especially "where the court of appeals' state-law ruling is plainly wrong").[4]

Certiorari was granted in the case of Lambright's codefendant, *Stewart v. Smith*, No. 01-339 (Dec. 12, 2001) (issue of Rule 32 interpretation certified to Arizona Supreme Court), to address this same Ninth Circuit panel's failure to reasonably apply Arizona's procedural default rules in capital cases. The Court should do the same here, that panel having "decided an important federal question in a way that conflicts with relevant decisions of this Court," as well as having departed significantly from the "accepted and usual course of judicial proceedings." Supreme Court Rule 10(a), (c).

III

THE NINTH CIRCUIT MISUNDERSTOOD *HARRIS v. REED*, FAILING TO RECOGNIZE A LEGITIMATE ALTERNATIVE RULING, AND ABDICATED ITS DUTY TO EXAMINE THE FULL RECORD TO ATTEMPT TO RESOLVE ANY AMBIGUITY THERE MIGHT HAVE BEEN IN THE RULING.

In rejecting Lambright's motion for reconsideration of its prior denial of relief, the trial court stated:

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4. It would be foolish to prefer the construction of an Arizona procedural rule by a panel of judges from California over that of District Judge John M. Roll, who sat on the Arizona Court of Appeals for 4 years. Federal Judicial Center biographies. <http//air.fjc.gov/history/index_frm.html> *See Leavitt*, 518 U.S. at 145 (reversal of appellate panel from Oklahoma, Colorado, and Kansas, which overruled District Court on Utah law).

> Paragraph a—this issue existed factually prior to appeal; the Arizona Supreme Court looked at the entire sentencing process exhaustively, testing it for error of constitutional dimensions and found none. There is therefore the suggestion, and strong inference, that this claim is precluded under Rule 32.2(a)(2); *however, i[f] not, the Court finds that since it clearly could have been raised on direct appeal, that it has been knowingly, voluntarily and intelligently waived by failure to raise it, and therefore is precluded pursuant to Rule 32.2(a)([3]) and (c)* . . . .

(Supp. App. to Pet. at F-2; emphasis added.) The Ninth Circuit misapplied *Harris v. Reed*, 489 U.S. 255 (1989), twice: first, by burdening Petitioners to show that this state-court action did *not* rest primarily on federal law, even though it does not "fairly appear" the ruling relied on federal law; second, by failing to recognize that the trial court provided precisely the sort of brief alternative merits and default rulings *Harris* promises to accept (489 U.S. at 265 n.12).

Lambright tacitly concedes the first contention, not even attempting to refute it; such grave misconstruction of *Harris* by itself warrants certiorari. His response to the second error merely replicates rather than justifies what the Ninth Circuit did—he turns a blind eye to the plainly alternative nature of the ruling (*i.e.*, that the trial court would not consider the ineffectiveness claim because it might have been considered on the merits by the Arizona Supreme Court's independent review of the case, *and* because, in any event, the claim *could* have been raised during the direct appeal), focusing on the first prong (which, as a merits ruling, obviously cannot preclude federal review) as if it constituted the entirety of the ruling. (Opp. at 13–15.) Not even Lambright can maintain the charade that the alternative rulings are so "mixed" or "ambiguous" they can't be distinguished: he himself characterizes the "first" portion as a merits ruling the trial court could not consider because of Rule 32.2(a)(2), separate from a "second" ruling premised on the waiver provision, Rule 32.2(a)(3). (Opp. at 12–13.) When even the party trying to support the Ninth Circuit's analysis finds it impossible to describe the trial court ruling

except as two distinct parts, founded on separate rules, the illegitimacy of the Court of Appeals' attempted intermingling of the alternative rulings becomes self-evident.

The Ninth Circuit's ruling possesses implications of the highest order. If it is allowed to disregard plainly *Harris*-sufficient alternative rulings here then *Harris* itself and the independent state ground doctrine by which this Court limits federal interference with state criminal proceedings will have been eviscerated. Then every state court holding (no matter how clearly intended to announce alternative procedural grounds for denying relief) will be opened to review when not phrased in whatever talismanic terms are deemed sufficient by the respective federal court. This Court forbids such hypertechnicality: "[W]e will not impose on state courts the responsibility for using particular language in every case in which a state prisoner presents a federal claim—every state appeal, every denial of state collateral review—in order that federal courts might not be bothered with reviewing state law and the record in the case." *Coleman v. Thompson*, 501 U.S. 722, 739 (1991).

This federal duty to review "the record of the case" to understand state court rulings perceived as ambiguous is implicated here. Purporting to rely on *Ylst v. Nunnemaker*, 501 U.S. 797 (1991), the Ninth Circuit insisted that *only* the ruling on denial of rehearing could be considered, holding the District Court erred in taking account of the trial court's original ruling denying post-conviction relief. 241 F.3d at 1205. Thus, even while characterizing the order denying rehearing as unclear, the Court of Appeals intentionally ignored readily available means to understand it—the first ruling alludes alternatively to procedural and merits grounds for denying relief with even greater clarity. (See Supp. App. to Pet. at E-2.)

Using *Ylst* as an excuse to avoid consideration of plainly relevant material was wrong. *Ylst* authorized looking through a silent state supreme court order to an explained lower court order; it did *not* allow a habeas court to disregard another reasoned dispositive order, on the same subject matter, in the same case, by the same court,

especially when the habeas court expresses confusion (appropriately or not) about the intent of the last explained order. This Court's concern for the *accuracy* of federal courts' handling of state court rulings demands that they consider circumstances surrounding the state court orders which could contribute to that accuracy. *Ylst*, 501 U.S. at 802–05; *Coleman v. Thompson*, 501 U.S. at 739. Therefore, to ignore the trial court's initial denial order which illuminates the supposedly ambiguous final order violates *Ylst* and *Coleman*.

The Ninth Circuit misapplied *Harris v. Reed*, *Ylst* and *Coleman* to avoid crediting the state court's procedural ruling. Only a grant of certiorari can halt such distortion of this Court's precedents.

CONCLUSION

The Ninth Circuit misunderstood, misapplied, and manipulated a whole collection of this Court's decisions in a single, highly mischievous opinion. Based on the arguments above and in the Petition, the Court is urged to grant certiorari to correct it.

Respectfully submitted,

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